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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 95

RUTH ELIZABETH CHAPMAN and THOMAS LEROY TEALE,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONERS

MORRIS LAVINE
215 West Seventh Street
Los Angeles, California
Counsel for Petitioners

RICHARD E. JOHNSON
NELS FRANSÉN
Of Counsel

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(In Forma Pauperis)

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, Ruth Elizabeth Chapman and Thomas LeRoy Teale, have petitioned this Honorable Court to reverse the judgment of death now pending against Thomas LeRoy Teale and the judgment of life imprisonment now pending against Ruth Elizabeth Chapman, jointly tried in the Superior Court of the County of San Joaquin, State of California, for the crimes of murder, kidnaping and robbery.

Stay of execution was granted by this Court as to the sentence of death of Thomas LeRoy Teale on December 3, 1965.

Each petitioner is a pauper and was allowed to proceed in the Superior Court in forma pauperis during the trial of the case. Petitioners have been granted leave to proceed in forma pauperis on this appeal.

The Superior Court of the County of San Joaquin appointed Richard E. Johnson, of 315 Wells Fargo Bank Building, Stockton, California, to represent Ruth Elizabeth Chapman, and Nels Fransen, of the firm of Simonelli and Fransen, of 115 North Sutter Street, Stockton, California, to represent Thomas LeRoy Teale, as court-appointed attorneys. Both of these men are outstanding and devoted attorneys to their clients. Each has carried the case through the Supreme Court of California, which has affirmed the judgments of death and life imprisonment, respectively. They have asked present counsel to carry this case to the Supreme Court of the United States similar to the request made by the Public Defender in Los Angeles County in the case of *Eddie Dean Griffin* v. *California,* 380 US 609, 14 L.ed.2d 106, and this counsel has accepted and agreed to the task.

These counsel have both assisted counsel eminently and devotedly in this case. Their names should appear on the briefs as of counsel.

Opinions Below

The original opinion of the Supreme Court of California was set forth in 63 A.C. No. 4, page 175, a copy of which opinion is set forth in Appendix A hereof.

The opinion of the Supreme Court of California modifying its original decision was rendered August 27, 1965 and is reported in 63 A.C. No. 8, page 269, a copy of which opinion is set forth in Appendix B hereof.

The opinion as modified appears in 63 Cal.2d 178, a copy of which modified opinion is set forth in Appendix C hereof.

Jurisdiction

Jurisdiction is conferred on this Court by Title 28, Section 1257(3), U.S. Code.

The judgment of the Supreme Court of California was rendered on July 16, 1965. Petition for rehearing was duly and regularly filed on behalf of Ruth Elizabeth Chapman on July 26, 1965 and a petition for rehearing on behalf of Thomas LeRoy Teale was filed on July 27, 1965. In a modification of its opinion, the Supreme Court of California admitted that the trial court and District Attorney had violated this Court's decision in *Griffin* v. *California*, 380 US 609, 14 L.ed.2d 106, but declared it non-prejudicial and upheld the verdicts of life imprisonment and death, respectively. Both petitions were thus denied on August 27, 1965.

A petition for writ of certiorari was duly filed in this Court, which petition was granted on March 28, 1966, No.

875 Misc., October Term, 1965. Both petitioners are now in California prisons, awaiting this Court's decision. A stay of Mr. Teale's sentence of death was granted by Justice Douglas to await the outcome of this case.

Constitutional Provisions and Statutes Involved

In Appendix D hereof are the statutes and constitutional provisions involved, to-wit: The Fifth Amendment to the Constitution of the United States; the Fourteenth Amendment to the Constitution of the United States; Article 1, Section 13 of the California Constitution; Article 6, Section 4½ of the California Constitution; and Sections 187, 207, 209, 211 and 825 of the Penal Code of California.

Questions Presented

The Court has limited the questions to two.

However, inherent in these questions is the application of Article 6, Section 4½ of the California Constitution, which we have set forth also in Appendix D hereof.

The questions, as limited by the Court, are:

Where there is a violation of the rule of *Griffin* v. *California*, No. 609, (1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?

It is petitioners' position that violation of a constitutional right is *per se* harmful and prejudicial.

In this case the error was particularly harmful and prejudicial throughout.

The case was entirely circumstantial. The prosecutor used the constitutional right of silence of the defendants to

support and prop up his circumstantial evidence case. This is forbidden by the Fifth and Fourteenth Amendments to the Constitution of the United States.

Griffin v. *California,* 380 US 609, 14 L.ed.2d 106.

Summary Statement of the Case

The petitioners, Ruth Elizabeth Chapman, under life sentence, and Thomas LeRoy Teale, under sentence of death, respectfully ask this Court to reverse the judgments below for violation of their constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Ruth Elizabeth Chapman was arrested and taken into custody on October 26, 1962, in St. Joseph, Missouri. Her arrest was on a felony warrant for robbery, kidnaping and murder of Billy Dean Adcock, a bartender. (C.T. 1-2a) She was brought back to California in the custody of Lodi, California, officers and a California Deputy District Attorney named Kenneth Ferguson. She was not taken into court or arraigned for several days,[1] nor was she supplied with any attorney to represent her.[2] Instead, she was taken,

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[1] California law requires prompt arraignment before a magistrate, who advises defendants of their constitutional rights. (Secs. 858-859 California Penal Code.)

[2] Article 1, Section 13, California Constitution, and Section 859, Penal Code, require an attorney. Section 859 states: "'Time to Procure Counsel.—When the defendant is charged with the commission of a public offense, over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a court within the county in which the public offense is triable, he shall, without unnecessary delay, be taken before a magistrate of the court in which such complaint is on file. The magistrate shall immediately deliver to him a copy of the com-

at the request of the County District Attorney, to the offices of Dr. Ralph K. Winkler, a psychiatrist, in Stockton, and given a psychiatric examination and questioned for several hours regarding the events involved in the charges.

Prior to this examination, she was not advised of her right to counsel nor of her constitutional right to remain silent, nor was she furnished with the advice or assistance of any attorney nor was she taken into court to be arraigned, where she could be informed of her constitutional and statutory rights.[3]

Petitioner Chapman made a long and detailed statement of 84 pages to the Deputy District Attorney after her arrest, without having the benefit of counsel and without the advice of counsel and without being advised of her rights. This statement was given to the psychiatrist, who used it as the basis for his interrogation, which later became the subject of court testimony when the psychiatrist was called by the prosecution as a witness for the People and testified to the statements which she made to him, all without benefit of counsel.

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plaint, inform him of his right to the aid of counsel, ask him if he desires the aid of counsel, and allow him a reasonable time to send for counsel; and the magistrate must, upon the request of the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the judicial district in which the court is situated. The officer must, without delay and without fee, perform that duty. If the defendant desires and is unable to employ counsel, the court must assign counsel to defend him. If it appears that the defendant may be a minor, the magistrate shall ascertain whether such is the case, and if the magistrate concludes that it is probable that the defendant is a minor, he shall immediately either notify the parent or guardian of the minor, by telephone or messenger, of the arrest, or appoint counsel to represent the minor."

[3] *Escobedo* v. *Illinois*, 378 US 478, 12 L.ed.2d 977.

A Deputy Public Defender was appointed three weeks later, on November 16, 1962, and withdrew on January 29, 1963. Attorney Richard E. Johnson was then appointed by the court as counsel for petitioner Chapman. However, the statement which Mrs. Chapman made to the psychiatrist and which found its way into evidence against her and with its effect upon petitioner Teale, who was tried jointly with her, had already been taken.

Mrs. Chapman's attorney presented a defense of amnesia. The psychiatrist, Dr. Ralph K. Winkler, agreed that she had amnesia, but testified that, based upon her statement, he thought she developed amnesia after, rather than before, the alleged crime. Her attorney was not allowed to cross-examine the psychiatrist on her statement and thus was denied the right of confrontation and cross-examination. It is petitioners' contention that this statement violated the rule of *Griffin* v. *California,* 380 US 609, 14 L.ed.2d 106, and its use in any form was highly prejudicial, using as it did the words of the defendant herself, through the psychiatrist, to convict her.

Petitioner Teale was arrested on or about November 2, 1962 in New Orleans, Louisiana. Both defendants were charged with the murder of Billy Dean Adcock, a bartender. Adcock worked from 6:00 p.m. to 2:00 a.m. at the "Spot Club" in Lodi, County of Joaquin, State of California. (R.T. 972) He was found dead on Dillard Road in Sacramento County at 9:30 a.m. on October 18, 1962. (R.T. 922) Mr. Adcock's body was in a drainage ditch. Death was caused by gunshot wounds to the head. (R.T. 714) Time of death was estimated between 2:30 a.m. and 3:00 a.m. on October 18, 1962. (R.T. 722) Expert testimony established

that the bullets entering the victim's head were .22 caliber shots. (R.T. 1284)

The owner of the "Spot Club" arrived at the premises at 9:00 a.m. on October 18, 1962 (R.T. 984) for the purpose of balancing out the till. (R.T. 984) The owner observed Adcock's automobile parked near the front of the Spot Club, which was unusual. (R.T. 1003) Upon entering, he saw a drawer from the cash register resting on the top of the bar. (R.T. 985) The owner *estimated* that he was short about $200. (R.T. 998) However, his safe was unlocked and still contained approximately $400. (R.T. 986)

When defendant Teale was arrested in New Orleans on November 2, 1962, he carried a gun which had been purchased by Mrs. Chapman in Reno on the same day on which she purchased a .22 caliber weapon, and he was driving the automobile which had been in the petitioners' possession before and at the time of the killing.

After his return to California, Teale was confined with one Waldo Vowel, another prisoner, who testified as to a conversation he had with Teale wherein Teale stated that "he hoped Mrs. Chapman did not break down and start saying anything, because they didn't have anything on them yet." Later, the witness testified, he had another conversation with Teale in the prison yard: "I told him I knew Bill (the deceased), and he (Teale) told me he didn't plan for it to happen that way, and he started relating to me how it happened. He said that they were arguing over money all afternoon, and he said it was his idea to rob him and said he was going to take him out in the country and just run him off up through the vineyard, or something like that, but had no idea of killing him. But he said when they

pulled up and stopped, that he opened the door, he didn't say who was driving or nothing, just said when they stopped that he got out to go around—go around to the other side of the car to get Adcock out, and said that Mrs. Chapman shot him once in the back of the head, and then said when he fell, before he could get around the car, he said she shot him two more time."

The prosecutor argued that Teale did not take the stand to deny this. What could be more prejudicial to both defendants or seek to convict them out of their own alleged mouths?

Teale further stated, according to the witness, that "they" would never find the gun. In response to a question as to any statements Teale might have made regarding expected punishment, the witness stated: "Well, he said out there in the yard, he said if they had anything on him, he said he was going anyway, and he didn't want Mrs. Chapman to 'cop out' or anything, because he said if she didn't, you'd have to prove which one of them done it. Said he was going anyway, it didn't make any difference. So he said if she just kept quiet that she might get off with just seven or eight years." The foregoing testimony of conversations had with Teale was received under an admonition that the jurors could consider it only as to Teale. The argument was further made that Teale's silence confirmed this.

The petitioner Teale's defense was a denial of the commission of the homicide. Mrs. Chapman, in addition to a denial, submitted evidence tending to show that she lacked mental capacity to form the requisite intent. However, such testimony was to the effect that she suffered from a

"disassociative reaction"; that when she found herself in an uncontrollable situation she would "'black out' by simply not knowing."

The case against the two defendants was entirely circumstantial. At the close of a long line of People's witnesses, neither defendant took the witness stand.

~~Although~~ This Court had held in *Griffin* v. *California*, 380 US 609, 14 L.ed.2d 106, that the Constitution of the United States, under the Fourteenth Amendment, forbids the use by a state of a man's or woman's own statements to convict him or her, ~~the prosecutor in this case, nevertheless, proceeded to ignore the rulings of this high Court, as did the trial judge.~~ The prosecutor apparently felt his circumstantial evidence was not strong enough without one additional link, to-wit: the failure of the defendants to take the witness stand. The prosecutor sought to have the jury consider the silence of the defendants, on their standing on their constitutional rights, as a ground to convict them. The complete argument and comments by the prosecutor on the defendants' failure to take the witness stand is contained in Appendix E hereof, and made a part of this brief.

Summary of Argument

I.

The State of California admits that, after the *Griffin* case was decided and ruled upon by this Court, it violated the constitutional provisions decided in *Griffin* v. *California*, 380 US 609, 14 L.ed.2d 106, that comment on the failure of a defendant to take the witness stand violated the Fifth and Fourteenth Amendments to the Constitution of the United States. Prejudice is presumed from the violation of a constitutional right and requires reversal of the judgments below in order to preserve and protect that right.

II.

This was a circumstantial evidence case. Neither defendant took the witness stand, but relied on their constitutional rights not to be required to incriminate themselves. Nevertheless, the prosecutor took each circumstance and, after pointing it out, contended and supported his contention that the defendants' failure to testify constituted proof that the defendants were guilty or otherwise they would have taken the witness stand. He repeatedly stressed the point that only the defendants knew what happened and could raise their right hand and testify and, having failed to do so, he contended that this proved their guilt. Thus he used the rights given by the Constitution of the United States under the Fifth and Fourteenth Amendments as a weapon against them. This he is not authorized to do. The great prejudice that occurred to each defendant from this repeated argument of the prosecutor regarding the failure of the defendants to testify was used by him to

influence and convince the jury. He cannot now be permitted to say it was not prejudicial.

The trial judge also committed prejudicial error in giving an instruction out of *People* v. *Adamson*, 27 Cal.2d 478 (aff'd 332 US 46, 91 L.ed. 1903), which case has been disapproved by this Court in *Malloy* v. *Hogan*, 378 US 1, 12 L.ed.2d 653. This also prejudicially affected the jury in giving the jury the right to determine guilt from the exercise of the defendants' constitutional privileges.

ARGUMENT

It is admitted that the argument covering the self-incriminating point covered practically every point made by the prosecutor and that it violated this Court's decision in *Griffin* v. *California*, 380 US 609, 14 L.ed.2d 106, *Malloy* v. *Hogan*, 378 US 1, 12 L.ed.2d 653, and *Murphy* v. *Waterfront Commission of New York*, 378 US 52, 12 L.ed.2d 678. But the State still seeks to evade this Court's decision in *Griffin* v. *California*.

The prosecutor thought his circumstantial evidence case was not strong enough without using this argument or he would have dispensed with it as surplusage. Surely, it cannot now be claimed that even though the constitutional rights of the defendants were shockingly violated in an effort by the prosecutor to lift up his case by comment on the failure of the defendants to testify as evidence against them, that now that he has succeeded in having the jury reach a verdict of guilty, with a death sentence as to Teale and life as to Mrs. Chapman, that he can now claim, and the Court can dispense with the violation on the grounds that it is not "prejudicial".

The argument we make is very clearly supported by analogous language of this Court in *Bram* v. *U.S.*, 168 US 532, 42 L.ed. 568, wherein this Court stated:

> "It is also clear that in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt. Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequence of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt."

By analogy, the same principle applies here. The prosecutor having offered the comments on the failure of the defendants to take the witness stand, on the one hand, to prove guilt, and which by the very offer is vouched for as tending to that end, cannot on the other hand, now, for the purpose of avoiding the consequences, be heard to assert that the matter offered was not prejudicial because it did not tend to affect the jury.

It is stated in *Miller* v. *Territory of Oklahoma*, 149 F. 330:

> "The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence

upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

The foregoing case is cited with favor in California in *People* v. *Glass,* 158 Cal. 650, 659.

The theory of the State of California is that a little poison may be all right, but too much will kill and therefore they should be allowed to use a restrained quantity of it and let them be the judge of what quantity they use. But constitutional rights are guarantees which our forefathers placed there without limitation. The Fifth Amendment does not state that testimony obtained by means of self-incrimination or by the failure of the defendant to incriminate himself may be used and then dispensed with at the whim or will of the prosecution or the trial judge. It is the sacred guarantee in the preservation of all human rights. The violation of a constitutional right is a wrong

so fundamental that it makes the whole proceeding a mere pretense of a trial and renders conviction and sentence wholly void.

Chambers v. *Florida,* 309 US 227, 84 L.ed. 716;
Faye v. *Noia,* 372 US 391, 9 L.ed.2d 837, 854;
Moore v. *Dempsey,* 261 US 86, 67 L.ed. 543;
Massiah v. *U.S.,* 377 US 201, 12 L.ed.2d 246;
Escobedo v. *Illinois,* 378 US 478, 12 L.ed.2d 977;
Powell v. *Alabama,* 287 US 45;
Gideon v. *Wainwright,* 372 US 335, 9 L.ed.2d 799.

What has been said with relation to violation of a constitutional right being *per se* prejudicial is further supported by California practice, particularly in this case where the verdict is a general one and one has no means of psychoanalyzing the jurors to find out what bit of evidence or what bit of argument swayed them.

The comments of the prosecutor in this case are replete with admitted violations of the Fifth and Fourteenth Amendments to the Constitution of the United States, prohibited by this Court's decision in *Griffin* v. *California,* 380 US 609, 14 L.ed.2d 106. Neither defendant took the witness stand, but the prosecutor, in each point that he argued, strongly emphasized their failure to take the witness stand as the basis of a request for conviction and the death penalty.

Thus, the prosecutor said:

> "So, in considering what happened here as to why this person was killed, you see you can weigh these things and decide what the motive was. You might have had some help in deciding this very difficult

task from the very only two people remaining who were at the scene, *but in their best judgment they didn't choose to get up and tell you about it, which you certainly can consider that fact that they did not in the light of using your reason as I have indicated here too.*" (R.T. 2257)

And again:

"You know that somebody shot Billy Dean Adcock, and you know that it was either—it was one or even both of these defendants, in view of your verdict, but which one you don't know. . . . It might have been helpful to know who pulled that trigger, . . . and you can consider that factor which has not been, from the standpoint there have been two people that might have explained that." (R.T. 2258-2259)

And:

"You like to know that persons get—if there is something about their background that they can tell you, . . . you like to hear it from them, . . . and the fact that they chose to rest upon whatever evidence there is here in the case in chief is *something that you can consider in deciding whether or not they have been fair with you.*

"This is the chance that they take by not having taken the stand." (R.T. 2288)

The prosecution denied Mrs. Chapman's repeated efforts to get a speedy trial after her arrest, for she once had a nervous breakdown and she was anxious to have her case tried as guaranteed by the Constitution of California and the Constitution of the United States.

Article 1, Section 13, California Constitution;
People v. *Fegelman*, 66 Cal.App.2d 950;
Harris v. *Municipal Court*, 209 Cal. 55.

Nevertheless, the court kept delaying her trial so that she had another nervous breakdown in the middle of the trial. She was given tranquilizers, as shown by the report to the court during the trial. (C.T. 329) She collapsed 22 days after the trial commenced, which was 82 days after her affidavit stating that she wanted a speedy trial and intended to testify, if given one. However, by the time that the trial took place Mrs. Chapman, with the knowledge of the prosecution, was in no physical or mental condition to take the witness stand due to the delay by the prosecutor himself in bringing her case to trial. In spite of this fact, which was within the knowledge of the judge and the prosecutor but not the jury, the prosecutor commented upon her failure to testify, commenting as follows:

> "Certainly the defendant Ruth Elizabeth Chapman could tell you, she could tell you under oath, she could subject herself to cross-examination, and she could tell you then and it would be evidence before you. *Once again she has not chosen to do this. So any inference you may draw therefrom will be an adverse inference under the circumstances, and under the instructions of the Court.*" (R.T. 1827)

Mrs. Chapman was the first of the two defendants arrested. After her arrest, the prosecutor arranged to have her examined by psychiatrists. During the trial of the case the psychiatrist, Dr. Ralph K. Winkler, was placed on the witness stand and testified as follows:

By Mr. Drivon, the prosecutor:

"Q. Now you were, *at the request of my office,* asked to make a psychiatric examination of the defendant Ruth Elizabeth Chapman, is that correct? (Emphasis added.)

"A. Yes, sir.

"Q. And when was that, and where, and how long did it take, and of what did the examination consist?

"A. This examination was conducted on October the 31st of 1962. It took place in my office in Stockton State Hospital. The examination took a little over a two-hour period. It consisted of taking pertinent background information from the patient of a historical nature, the general interview situation and the general mental examination. (R.T. 1767) . . . .

"The question which came to my mind was when did this loss of recall occur, and *I had to take into consideration the statements and the history which she had given me.*

"Now, it seemed apparent to me that during a period prior to the loss of recall or amnesia, whichever we want to term it, that Mrs. Chapman would be capable of forming an intent. During the actual period when there was a loss of recall, there is still a possibility that within that specific period of time she could form intent, but the intent would not be related to the previous period. Does this answer . . . (R.T. 1768-1769)

. . .

"A. Going by the statements which Mrs. Chapman gave to me, she claimed a loss of recall for the period following her hearing a shot being fired while she was driving an automobile.

"Q. I see. Did she relate to you, Doctor, or she did relate to you, did she not, the period of time, the history of going from Ukiah to Reno, and then Tonopah and Las Vegas and then Fresno and then to Croce's Cafe in Lodi, and then into another club and where a person was abducted, and then driving an automobile and then she hearing a shot fired?

"A. *She related this in quite detail* and this was part of the report I submitted to your office.

"Q. Yes. You did submit a report. (R.T. 1770)

. . .

"Mr. Drivon: I see. Well, the shot to which you refer, you say that the amnesic episode, if it did occur, occurred after the shot she heard prior to while she was driving the automobile, occurred after that in your opinion doctor?

"A. This is my opinion, based on the statement she has given me. (R.T. 1771)

. . .

"Q. Now, this examination—well, I'll withdraw that. This examination, and your opinions drawn therefrom, were primarily from what she told you of the events, and how much she was able to recall, and the specific details, is that correct?

"A. Yes, sir. (R.T. 1774)

. . . .

"Q. Actually, you said that your test—examination was primarily an interview with her, is that correct?

"A. Yes, sir, it was.

"Q. And the history, called data, that you obtained from her?

"A. Yes, sir, it was." (R.T. 1775)

It was during this examination that the psychiatrists obtained detailed information and thereafter testified regarding the alleged crime as it related to both defendants. The psychiatrist testified to his interview and the conversations and statements obtained.

When neither defendant took the witness stand, the prosecutor then commented at length on this fact. Thus, although all of the purported details of the crime were related to the jury through the eyes of a psychiatrist who had examined Mrs. Chapman without benefit of counsel and without her taking the witness stand, the prosecutor then added to this use of self-incriminating information by his comment to the jury, as follows:

> "Ruth Elizabeth Chapman is sitting right over here, she is one of the defendants in this case and she is the one certainly if anyone, if anyone in this room, or in this state knows what was in those boxes she is the one, *but once again she did not take the stand, raise her right hand, and tell you about that. She didn't take the stand at all, ladies and gentlemen, she could have come up and told us exactly what articles were sent, so you may draw any inferences from that that you wish to, as long as they are reasonable.*" (R.T. 1864).

Further, at another point, the prosecutor said:

> "Originally when Dr. Winkler examined her on the 31st, I believe it was, of October, 1962, she told him that she had forgotten after the first shot was fired, after the first shot was fired. Since that time what has happened? The amnesia, or disassociative state, or disassociative reaction, whichever way you want to look at it, psychiatrically or otherwise, seems to have

backed up from Dillard Road back up to the Spot Club, back up down Highway 99 south to just outside of Croce's, and by the time we get through cross-examining Mr. Sheuerman it even backed in to Croce's. A vague area. Very interesting. We could have put it on, put the statement in. It's evidence? It's not. Again, *the sanctity and worthiness of evidence would have to come from her lips, hers on the stand here.* Why? Here again, because witnesses would be under oath again, and I repeat, and I repeat for emphasis, they would have to be under oath subject to cross-examination before your very eyes so that you could evaluate it. Oh yes. She said this and she said that. Who said it? Who said it? Ruth Elizabeth Chapman on the stand? No. Dr. Sheuerman said that she said it. Dr. Winkler said that she said. Mr. Johnson said that she said. Well, *it's an interesting thing that the only witness* who weren't here, or weren't on the stand to be cross-examined, the only witnesses who are alive today to the perpetration of these offenses, are these two defendants. That's all." (R.T. 2108)

Although Teale was involved by indirection, the prosecutor repeatedly kept making a point of his guilt of the crime charged by reason of his failure to take the witness stand.

In Appendix E hereof, we have set forth the prejudicial comments of the prosecutor.

The judge used instructions formerly used in California in *People* v. *Adamson,* 27 Cal.2d 478 (aff'd 332 US 46, 91 L.ed. 1903), which this Court has now reversed in *Griffin* v. *California,* 380 US 609, 14 L.ed.2d 106. These instructions were as follows:

"In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element." (R.T. 2163-2164)

Mrs. Chapman's failure to take the witness stand was commented upon extensively by the prosecutor, who had acquired the information from Mrs. Chapman after her arrest.

The prosecutor said:

"Now whether or not Mr. Teale had any other money at the time or was in the habit or concealing his money in different departments, I don't know, and ladies and gentlemen, you don't know, because you have not had any testimony from that witness stand, and the only person that could clear this up for us ladies and gentlemen is the defendant Thomas LeRoy Teale. Ladies and gentlemen, *he had not seen fit to tell you about that.*" (R.T. 1824)

Again the prosecutor commented:

"He was a fugitive from justice, and he knew he was a fugitive from justice, and he never—let's face it, there were four F.B.I. agents and these fellows are professionals and they know what they are doing and one of them had a gun out and he never had an opportunity to use it, and none of us here will ever know from all the testimony, from the actual testimony on

the stand why he had the weapon with him fully loaded, *because Mr. Teale has never taken the stand in this case and testified for you.*" (R.T. 1854)

In the opinion of the court it was stated:

"The bullets which inflicted the deceased's wounds were fired from a .22 caliber weapon similar to a gun purchased by the defendant Chapman in Reno, Nevada, while there with Teale six days before the killing. Neither the gun which she purchased, nor the gun which fired the fatal bullets was located."

The prosecutor argued to the jury:

"Now, ladies and gentlemen, I don't know which one of these weapons was purchased first, I don't know that it particularly makes any difference, but as you know, we have had no testimony at all in that regard, in fact, I might add that the only person or persons that could give testimony in that regard would be, of course, the defendants themselves, so we don't know when they were purchased, or rather, we know the date, but we don't know the exact time or what the sequence was, but this, which I refer to here for the record, People's Exhibit No. 14, is a .32 caliber pistol that was purchased by the defendant Ruth Elizabeth Chapman.

"Now, this, there's no question about what this represents, or for the record here, no question in your minds, this is not the weapon that Ruth Elizabeth Chapman purchased in Reno, Nevada, on October the 12th, 1962. I don't know where that weapon is, ladies and gentlemen, and you don't know where it is, you've heard no testimony from the stand at all, and once

again, the only person or persons that could tell us about where the original .22 caliber Vestpocket is today would be one or the other of the defendants or both." (R.T. 1808-1809)

On another occasion the prosecutor argued that the deceased was robbed after a struggle:

"You know, ladies and gentlemen, that the next morning, the next morning somewhere between nine and nine-thirty, somewhere thereabouts, Mr. William Moore, just a private citizen, was driving down Dillard Road, and he had been on a job of some kind of air conditioner or something, he had been on a job in that area, and he was driving down the road with a fellow employee, and he saw the dead body of Billy Dean Adcock out on the road. He stopped just long enough to feel in his own mind that this person was dead. He could observe certainly the shirt. It's obviously full of blood. He could observe the body half submerged in the water. His next move was to go to the nearest house, which was some distance away, a mile or so, and have a call placed to the Sacramento Sheriff's Department. You heard the testimony that Deputy Ferrill, who was the first deputy on the scene, the murder scene itself. He observed the papers strewn around the area, he observed the dead body, and he observed that this particular shirt—the one that you have seen—somebody even said they held it up, et cetera, so that you could observe it more clearly. Now, there are a lot more tears in it, but he observed that there was a tear someplace in this area. I believe he said another small one somewhat closer up. As you know now from hav-

ing removed the shirt from the body, having been dead for some time, naturally rigor mortis set in, and with all natural caution, when you remove the shirt from the body there will be some tears, and I am not suggesting or implying that all of the tears that are on there now were involved when the individuals robbed or shot, when he was out on Dillard Road.

"This would indicate that there was no small struggle—it would indicate that the body, almost lifeless, was dragged or left in some fashion which would cause a shirt or an article of clothing to tear, one or the other. Once again, ladies and gentlemen, I don't know, I wasn't out there, you were not out there. *You heard no testimony on the stand. The only individuals that could give you that information would be the defendants, either one or both of them, Thomas Leroy Teale and Ruth Elizabeth Chapman. And of course you know that you have not heard from them.*

"Now, I will comment throughout my entire opening argument to you in reference to the fact that neither one of these defendants has seen fit to go up, raise their right hand, take that witness stand, tell you ladies and gentlemen of the jury exactly what did occur, explain to you any facts or details within their knowledge so that you would know. You would not have to—by His Honor's instructions you can draw an adverse inference to any fact within their knowledge that they couldn't testify to, and they have not subjected themselves, either one or both, to cross-examination. Now, that is—so there is no question in your mind, once again with reference to a defendant taking the stand, none—you are—you or I or anyone else is

not required under our legal system in these United States and under the Constitution, you can not be made to testify against yourself or for yourself, as far as that goes." (R.T. 1821-1823)

In reference to the purchase of the gun, the prosecutor argued:

"Now, ladies and gentlemen, in reference to the weapons being purchased in Reno, Nevada on October 12th, you have heard, ladies and gentlemen, no testimony, and you will recall clearly, you are going to have some difficulty, you really are in reference to what is and what isn't evidence in this case, and believe me I have a few comments to say on that a little later on, but if you will recall as far as evidence is concerned of the truth of anything at all, you don't have any evidence on why these—why these pistols were purchased. Why did Ruth Elizabeth Chapman buy two weapons? Well, you do recall that she told on one occasion that she had had a pistol stolen from her vehicle, her automobile, when she was taking a little trip across country, you remember that testimony, and you can rely on the testimony that you actually hear, ladies and gentlemen, from the stand. She told that, and of course you can only rely that she told the gentleman that, that she had had another one stolen, and so that she needed one to replace it. But why two, ladies and gentlemen? You don't need two. If she is going to be attacked she wasn't going to use one in each hand I assume to defend herself, and there is another area, ladies and gentlemen, besides this that I mentioned to you before, that since you have no testimony from the stand, you must sur-

mise from all facts and circumstances as to the exact reason why they were purchased, because the only one in this room that could tell you why these guns were purchased is either one or both of the defendants. Certainly the defendant Ruth Elizabeth Chapman could tell you, she could tell you under oath, she could subject herself to cross-examination, and she could tell you then and it would be evidence before you. Once again she has not chosen to do this. So any inference you may draw therefrom will be an adverse inference under the circumstances, and under the instructions of the Court. Of course, you are the exclusive judges of the facts themselves." (R.T. 1826-1827)

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"To me they are charged with serious crimes, ladies and gentlemen. *They can come up and testify and then it will be evidence for you to consider in this case.* If they had just come up and told you about this, because they were there. If they left the Spot Club and just went on their way, well, of course they didn't, the evidence clearly shows they didn't, but you may draw the adverse inference from their refusal to come before you and raise that right hand and incidentally, of course, subject themselves to cross-examination. So, we know that they had the motive. And we know that they had the means and we know that they had, ladies and gentlemen, the opportunity." (R.T. 1829)

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"I think it is not an unreasonable inference to infer at this time if the defendants were drinking beer earlier in the evening in Croce's, it's not unreasonable to infer they continued drinking the same thing, there-

fore the two glasses remaining that had been washed, but not put up were the defendants'. I don't know, it is an inference, I wasn't there, we have had no testimony whatsoever as to what they were drinking at the Spot Club, once again, neither one of the defendants have seen their way clear to come up and tell you what they were drinking if it was beer." (R.T. 1838)

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"Now, ladies and gentlemen, the doctor further testified that in his opinion and from the powder burns that were on the back of the head that it was fired at some distance, and I believe he said something like possibly eighteen inches, something of that sort. If I'm wrong, you can correct me. It was not a great deal of distance, but it was some eighteen inches or so, however, the ones that were fired in the side of the head and as you recall were so close together that upon the initial examination you couldn't tell that there were actually two bullets that went through there, he said were fired within a couple of inches of that head, and he tells that because of the powder burns, how much powder was left on the side of that head. So you can see that whichever one of these defendants shot him, and once again, ladies and gentlemen, here is an area that I don't know who shot him, and you don't know who shot him, because we have had no testimony from that witness stand to tell you who shot him, and the only two persons in this courtroom that could tell you which one of them it was that shot him are the two defendants; but once again, they have both decided that they will not get up and raise their right hand and testify in this regard and subject themselves to cross-

examination, so all we know is that one of them shot him." (R.T. 1840-1841)

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"They took Room No. 11, and there was a party of two. We also know, ladies and gentlemen, that we have a motel registration, I'll look quickly and see if I can find it, otherwise I will merely mention it, a motel registration at Ukiah, California. I believe we have it here, the Mountain View Motel, People's Exhibit No. 73, Ukiah, California, date of registration October the 18th. The same day, ladies and gentlemen. The same day. We don't know the time here, it doesn't say. We don't have any testimony, ladies and gentlemen, in this regard, and I might say once again in reference to this last, the use of the name, T. L. Rosenthal, Mr. and Mrs., we don't know why, ladies and gentlemen, that name was used. We don't know why, ladies and gentlemen, that UZV 155—was 156 originally on here. You don't know that, and I don't, because we haven't had the testimony from the witness stand on it. Now we know it is in the handwriting of Ruth Elizabeth Chapman, and there is no question about that. She wrote it. It could be evidence, ladies and gentlemen, for you. It could be evidence as to why she wrote that name, and why that five was changed to a six. We could have it. But we don't, because either one or both of the defendants, neither one, have even seen fit to take the stand and to testify in that regard. Then this would be evidence that you can consider. But also ladies and gentlemen, subject to taking the oath and subject to cross-examination. But as you recall, you certainly can infer when you have no other evidence in the case, ladies and gentle-

men, of the use of any other name, other than Teale or Chapman, in their various trips from motel to motel, this is the first time, ladies and gentlemen, and only a couple of hours after the murder was perpetrated, and the robbery, and the kidnaping, that a phony name was used.

"And it's incidentally a phony license number. There's no evidence that any other name, either Teale or Chapman—they've all been used—the license number has always been correctly stated. No one has ever been able to change that before. We see it here in Mountain View, the Mountain View Motel, the name of Teale, but we don't have the testimony of the defendants and ladies and gentlemen they are the only ones here in this case that could get up there and tell you why they used a phony name two hours after the crime and why they didn't put the correct license down and whatever inference you draw you are permitted to draw since they do not choose to tell you an adverse interest, and I would say, ladies and gentlemen, that it is an adverse interest to the defendants. It shows a consciousness of guilt. It shows that they are using a name other than their true name and one other than the true license number. A question of detection." (R.T. 1844-1846)

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"Now, ladies and gentlemen, what is this—first of all, 'I thought I'd better let you know that Tom arrived here today and we're going south tomorrow'? Now, what does that mean? Well, I think without saying a great deal more about it that each of you can certainly infer as to what it very readily could mean,

especially if one has in fact committed a robbery and kidnapped someone from the premises and that individual has ended up dead, shot three times in the head. *And further, ladies and gentlemen, the only other thing I can say about it is this, who can really tell you and who could have told you from evidence, from the witness stand, what that letter meant? Well, the only one is Ruth Elizabeth Chapman, ladies and gentlemen. If it didn't mean what you can reasonably infer that it means, then I say, ladies and gentlemen, she could have come up here and testified, gotten on the witness chair. We have had many witnesses in this case, no one I would assume more interested than Ruth Elizabeth Chapman, or the co-defendant, neither one took the stand.* She in no way, nor has there been any way, ladies and gentlemen, any kind of evidence that has actually been admitted for the truth of the evidence, in no way is there any evidence as to why she wrote that letter, and what she meant by 'Tom is arriving today and we're going south.' Once again, she did not choose to tell you. So, we may only infer, and this will be, of course, you will have to in your final analysis draw any inferences from that that you feel are appropriate and are proper—" (R.T. 1848-1849)

The prosecutor argued with reference to a gun that Teale had on him at the time of his arrest:

"He was a fugitive from justice, and he knew he was a fugitive from justice, and he never—let's face it, there were four F.B.I. agents and these fellows are professionals and they know what they are doing and one of them had a gun out and he never had an opportunity

to use it, and none of us here will ever know from all the testimony, from the actual testimony on the stand, why he had the weapon with him fully loaded, because Mr. Teale has never taken the stand in this case and testified for you. These things are things only within his knowledge, ladies and gentlemen. *If there is any fact in this case of any relevancy of any importance it is within the knowledge of a defendant, and they chose not to take the stand and tell you about it, where incidentally they are under oath and can be cross-examined. You may draw an adverse inference from the fact that they do not take it.* I think the inference is very clear, too, why they had this weapon here and why he never—why it was fully loaded. Remember there was never an opportunity to use it. The weapon was purchased by Ruth Elizabeth Chapman. Now when he is apprehended and fleeing from the State he had it with him and it was fully loaded. Once again, I don't know where the original is here, and you know the only two that can tell us where that is.

"Now, you recall also that when Mr. Basham took him back in, was fingerprinting him, etc., he told him he was wanted in California and no one mentioned anything about Lodi, and he said that he would waive extradition and he also did say he said, 'They will have a hard time proving I was there.' And Teale himself did mention Lodi. Well, I don't know what he meant by that statement. I certainly can draw my own conclusion, and you sure will draw yours as the triers of the facts and the judges of the facts, ladies and gentlemen, but once again Mr. Teale did not take the stand and testify under oath in this case, and Mr. Teale has not

desired to take the stand and explain what he meant by it. He didn't have to, of course, but once again you can draw whatever inferences you may feel, and the law is clear that you may draw an adverse—where a defendant does not explain and he does not choose to take the stand and explain it to you you can drawn an adverse inference." (R.T. 1854-1855)

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"But you'll recall that for instance I know the shoes here, they were admitted into Court. There was blood found on them, and you recall the blood down here on the soles, right here, right here, and back in this area, Agent Gilmore has drawn and made some notations in reference to where that blood was located, blood found on these shoes. Now, all we know, ladies and gentlemen, as far as evidence in this case is concerned, is that these shoes belonged to Ruth Elizabeth Chapman and they were in her possession when she was apprehended in St. Joseph, Missouri, and why do I say that's all you know? That's all you may take into consideration, ladies and gentlemen, because we have no other testimony on this witness stand in relation to any of these articles of clothing that are actually admitted into evidence." (R.T. 1861-1862)

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"Couldn't this be cleared up for us, though? It could be cleared up so easily. Ruth Elizabeth Chapman is sitting right over here, she is one of the defendants in this case and she is the one certainly if anyone, if anyone in this room, or in this state knows what was in those boxes she is the one, but once again she did not take the stand, raise her right hand, and tell you about that. She didn't take the stand at all, ladies and

gentlemen, she could have come up and told us exactly what articles were sent, so you may draw any inferences from that that you wish to, as long as they are reasonable.

"All right. There are the shoes, ladies and gentlemen, we know they had blood on them." (R.T. 1864)

The opinion of the Supreme Court discusses evidence connecting the defendants with the commission of the crime through the evidence that there was type "A" blood on some of the articles.

The prosecutor argued:

"You know there was a fur stole, I believe we have a fur stole over here, I don't know where it came from, Mrs. Chapman didn't testify to it, but we know that a fur stole, apparently this came—apparently this was turned over to Mrs. Mason, . . . " (R.T. 1869-1870)

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"Now, anything that—is clearly, and I'm sure you know by now and I don't have to repeat it too often, anything in this case that Mr. Teale could get up here now, he don't have to get up here, but all of the things that have been said in this trial and all of the physical evidence and the testimony, he's right here in Court and could he not get up and if there is anything to be said he has the opportunity to say it. Otherwise, you may draw the adverse inference from the fact that he doesn't get up there and tell you about it, and that, ladies and gentlemen, is his defense." (R.T. 1881)

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"I think there are some instances that indicate already—I have indicated some, the purpose of the guns, two different ideas there as to why they were purchased, but that is the only legal purpose for that. So, it's not evidence, although Mr. Johnson again I say argued and referred to it as though it was. We have no evidence from the lips of Mrs. Chapman." (R.T. 2106)

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"The evidence showed here that she bought two guns for Teale. What evidence? *No witness on the stand got up there and said specifically under oath, and the only one that could do it would be Elizabeth Chapman herself.* This is hearsay, what she told somebody else for the sole purpose of determining what her state of mind was at the time. It's not evidence. There's some evidence from her own lips through Dennis Mack as to the reason she bought the gun, which is different than what she said otherwise. Mr. Johnson said the evidence shows there was an argument in Fresno. Here again I would say, 'What evidence?' The next one—there are only two people there to that argument, and the only way it would be evidence, or testimony in this case, would be if either one or both of them got up there and said there was an argument. They chose not to do it. You can draw an adverse inference that that being within their knowledge, that they could explain, whether it was or not. You can draw an inference that it wasn't the type of argument that Mr. Johnson claims the evidence shows, because the evidence doesn't show that at all." (R.T. 2115-2116)

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"Mr. Hardwick said that when she would have too much to drink he would take her home. She couldn't remember the next day. Here again you are getting the results of this intoxication, and what it amounts to from Ruth Elizabeth Chapman, and hearsay with regard to what she concluded. No one else. We didn't see her on the stand." (R.T. 2119)

During the penalty phase of the case, the prosecutor argued:

"Only two people know. They didn't tell you. That is the way they want to proceed. But nonetheless, you can consider that too. It might have been important in weighing this very difficult thing which you have to weigh, and I will have a little more to say about that in a moment.

"The motive might have been to perhaps destroy a witness. Now, you can consider that with regard to Ruth Elizabeth Chapman not having had any experience, there is no evidence that she was involved in anything before, her record apparently is clear. At least there is no evidence, not having been involved in this that she would be less likely to have a motive for destroying a witness, for example, than Thomas Leroy Teale, who went through one of these things before and the witness lived, and others lived to testify against him.

"So, in considering what happened here as to why this person was killed, you see you can weigh these things and decide what the motive was. You might have had some help in deciding this very difficult task from the very only two people remaining who were at

the scene, but in their best judgment they didn't choose to get up and tell you about it, which you certainly can consider that fact that they did not in the light of using your reason as I have indicated here too." (R.T. 2256-2257)

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"Now, you can consider that as indignation against the defendants. Now, you can consider also that perhaps there were facts for or against these two defendants which have not been brought to light, and one of them I mentioned. You know that somebody shot Billy Dean Adcock, and you know that it was either—it was one or even both of these defendants, in view of your verdict, but which one you don't know. Now, this is something that perhaps might have been of help to you in deciding what punishment to mete out, whether both should be punished equally in this case, or whether there should be some distinction between the two. It might have been helpful to know who pulled that trigger, for if it was Ruth Elizabeth Chapman you could well deduce that it was either her intoxication or emotional stress or a jealousy of Teale, or anger, and a lot of things other than the motive to destroy a witness; whereas, with respect to Mr. Teale it would seem to be a logical thing to conclude that he wanted to get rid of the only eyewitness. Differences there, you see. But you don't know. You don't know whether they did it in consort. You don't know that as far as pulling the trigger. But, this is a factor which has not been brought to light, and you can consider that factor which has not been, from the standpoint there have been two people that might have explained that. Was

it an accident—you might have been interested, and I think you would, whether it was an accident. You don't know. Or whether it was deliberate. From the physical evidence, one shot in the back of the head and two in the side, it doesn't seem to indicate an accident. It seems to indicate deliberate." (R.T. 2258-2259)

CONCLUSION

Wherefore, petitioners pray for reversal of the judgments below.

Respectfully submitted,

MORRIS LAVINE
Attorney for Petitioners

APPENDIX A

Original Opinion of Supreme Court of California

[63 A.C. No. 4, page 175]

APPEALS (one automatically taken under Pen. Code § 1239, subd. (b)) from a judgment of the Superior Court of San Joaquin County. William Biddick, Jr., Judge. Judgment affirmed in part and reversed in part as to one defendant and affirmed as to the other defendant.

Prosecution for murder, robbery and kidnaping. Judgment of conviction of first degree murder, first degree robbery and simple kidnaping reversed insofar as it imposes sentences for robbery and kidnaping on one defendant and affirmed in all other respects as to such defendant; affirmed in all respects as to the other defendant.

Nels B. Fransen, Thomas R. Krehbiel and Richard E. Johnson, under appointment by the Supreme Court, for Defendants and Appellants.

Stanley Mosk and Thomas C. Lynch, Attorneys General. Doris H. Maier, Assistant Attorney General, and Raymond M. Momboisse, Deputy Attorney General, for Plaintiff and Respondent.

PEEK, J.—Defendants Thomas L. Teale and Ruth Elizabeth Chapman were convicted by a jury of the first degree murder of Billy Dean Adcock, robbery of the first degree and simple kidnaping. A life sentence was imposed upon the defendant Chapman as to the murder count and she appeals from the whole of the judgment. The death penalty was imposed upon the defendant Teale, and his appeal is automatic pursuant to the provisions of section 1239, subdivision (b) of the Penal Code. The order denying defendants' motion for a new trial being nonappealable, the defendant Chapman's purported appeal therefrom must be dismissed. (Pen. Code, § 1237.)

On October 17, 1962, defendants registered at a motel in Fresno, where they gave a bad check in payment of their room rental. At approximately 10 p.m. on that same day

they entered a tavern near Lodi where they remained for nearly three hours and together consumed five bottles of beer. Mrs. Chapman went outside for awhile and upon her return was heard to say to Teale: "Let's go, we are not going to do anything here," or "We can't do anything here, let's go." They then left the tavern together.

Defendants next appeared at about 2 a.m. the following day at the "Spot Club" in Lodi. The only persons in the bar at that time were the defendants and Adcock, the bartender. Shortly thereafter three persons, including the bartender and a woman of Mrs. Chapman's general description, were observed in front of the Spot Club. The third person in the group, a man resembling the defendant Teale in general appearance, was standing behind the bartender, who apparently was locking the door of the tavern.

The following morning the owner of the bar found it to be in unusual disarray. The cash register had been broken into and approximately $260 was missing. Papers usually kept in the register were scattered about the floor. Routine housekeeping tasks which the bartender generally completed before leaving had not been performed.

Later that morning the victim's body was found in a remote area north of Lodi. It was half submerged in an open ditch by the side of a road. The clothing was torn and there was blood on the face and on the surface of the road nearby. The victim had been shot three times in the head, two bullets apparently penetrating through the same wound on the left side of the head from a gun held as close as two inches. The third bullet entered the back of the head from a gun held some 18 inches away. The time of death from the gunshot wounds was estimated at 3 on the morning of the 18th.

The bullets which inflicted the deceased's wounds were fired from a .22 caliber weapon similar to a gun purchased by the defendant Chapman in Reno, Nevada, while there with Teale six days before the killing. Neither the gun which she purchased, nor the gun which fired the fatal bullets was located.

Numerous items of personal property were found in the vicinity of the body, including the victim's wallet from which $50 to $65 in cash had been removed, and a check for $2.00 bearing a stamp "Refer to Maker," which had been signed by Mrs. Chapman.

Evidence connecting defendants with the commission of the crime was submitted by an expert witness for the People who testified that the victim's blood was Type A; that Type A blood was found on the right side of the front floor mat, spattered on the overhead fabric liner, the dome light and clothes rack in the back of defendants' vehicle; that blood had spattered or radiated out from the right front side of the automobile: that Type A blood was found on Mrs. Chapman's fur stole and spattered on a dress, blouse, skirt and shoes in her possession; that Type A blood was also found on defendant Teale's shirt and jacket; that numerous fibers taken from the victim's shoes matched those found in the defendants' automobile, that hairs were found in the automobile which matched those of the victim; that red paint found on the floor mat of the defendants' automobile came from the shoes of the victim, and that in the opinion of the expert the victim had been in the defendants' automobile.

Defendant Teale was arrested in New Orleans on November 2, 1962. At that time he carried a gun which had been purchased by Mrs. Chapman in Reno on the same day on which she purchased the .22 caliber weapon hereinbefore mentioned, and he was driving the automobile which had been in the defendants' possession before and at the time of the killing.

After his return to California Teale was confined with one Waldo Vowel, another prisoner, who testified as to a conversation he had with Teale wherein Teale stated that "he hoped Mrs. Chapman did not break down and start saying anything, because they didn't have anything on them yet." Later, the witness testified, he had another conversation with Teale in the prison yard: "I told him I knew Bill [the deceased], and he [Teale] told me he didn't plan for it to happen that way, and he started relating to me how it happened. He said that they were arguing over money all after-

noon, and he said it was his idea to rob him and said he was going to take him out in the country and just run him off up through the vineyard, or something like that, but had no idea of killing him. But he said when they pulled up and stopped, that he opened the door, he didn't say who was driving or nothing, just said when they stopped that he got out to go around—go around to the other side of the car to get Adcock out, and said that Mrs. Chapman shot him once in the back of the head, and then said when he fell, before he could get around the car, he said she shot him two more times."

Teale further stated, according to the witness, that "they" would never find the gun. In response to a question as to any statements Teale might have made regarding expected punishment, the witness stated: "Well, he said out there in the yard, he said if they had anything on him, he said he was going anyway, and he didn't want Mrs. Chapman to 'cop out' or anything, because he said if she didn't, you'd have to prove which one of them done it. Said he was going anyway, it didn't make any difference. So he said if she just kept quiet that she might get off with just seven or eight years." The foregoing testimony of conversations had with Teale was received under an admonition that the jurors could consider it only as to Teale. No claim is made and the record does not disclose that Teale's fellow prisoner was acting in complicity with the state.

Mrs. Chapman was arrested by an agent of the Federal Bureau of Investigation in St. Joseph, Missouri, on October 26, 1962, and thereafter gave conflicting accounts to the officer of her whereabouts on October 17 and 18. She stated first that she had been in Ukiah from the 17th to the 20th of October, on which latter date she left by bus for St. Joseph. She later stated that on the evening of the 17th and early morning of the 18th she had waited in a bus depot in San Francisco. However it was stipulated at the trial that a registration card for occupancy of a motel room by a "Mr. and Mrs. T. L. Rosenthal" in Woodland at 4:40 a.m. on October 18, was made out in her handwriting. The clerk of the

motel also testified that the registrant gave a false license number, and that the automobile in which the parties arrived was the one found in Teale's possession upon his arrest.

The record is mute as to the factual basis for certain of the requirements which must be satisfied before testimony of Mrs. Chapman's statements could have been properly introduced by the prosecution. However, the conflicting testimony relative to her whereabouts on October 17 and 18 was elicited on direct examination from the federal agent appearing as a witness for Mrs. Chapman. On cross-examination the officer testified, relative to the conflict in her statements, that she denied she suffered from "blackouts."

Neither defendant appeared as a witness.

[1a] Mrs. Chapman's first contention, that she was denied her constitutional right to a speedy trial, is not borne out by the record. She voluntarily waived the 60-day limit (Pen. Code, § 1382, subd. 2) and trial was set for February 5, 1963. On that date appointed counsel, the public defender, withdrew due to a conflict in interest in his representation of both her and the defendant Teale. New counsel appointed for Mrs. Chapman on February 5 instituted discovery proceedings and trial was postponed until March 19, presumably in the defendant's interest. (*People* v. *Donohoe,* 200 Cal.App.2d 17 [19 Cal.Rptr. 454].) Prior to the March 19 trial date Mrs. Chapman filed an affidavit that the public defender's prior representation of her would prejudice her right if a joint trial was had, and the court permitted the public defender to withdraw as counsel for Teale also. New counsel was appointed for Teale and trial was again postponed, to give such counsel an opportunity to prepare, until April 16, when trial was had.

[2] Where a continuance is granted upon good cause to a codefendant the rights of the other defendants are generally not deemed to have been prejudiced. (*People* v. *McFarland,* 209 Cal.App.2d 772 [26 Cal.Rptr. 596]; *Ferenz* v. *Superior Court,* 53 Cal.App.2d 639 [128 P.2d 48].) [1b] Moreover,

assuming without concluding that there was an improper denial of a speedy trial, the error must be prejudicial to merit a reversal therefor. (*People* v. *Wilson,* 60 Cal.2d 139, 152 [32 Cal.Rptr. 44, 383 P.2d 452].) Although Mrs. Chapman asserts that the delay caused her an emotional upset which persuaded her not to testify in her own behalf she still fails to show how her testimony would have aided her cause.

Both defendants contend that the evidence is insufficient to justify the verdicts. The defendant Teale further contends that the evidence presented to the grand jury failed to establish reasonable or probable cause to hold him to answer for the crimes charged. Teale unsuccessfully moved in the trial court to set aside the indictment on grounds of insufficiency (see Pen. Code, § 995), and his petition for prohibition upon the ground that the indictment was found without reasonable or probable cause was denied by the District Court of Appeal (see Pen. Code, § 999a). [3a] The evidence before the grand jury was substantially the same as that herein recited other than that of the People's expert witness and the fellow prisoner to whom Teale made certain admissions. [4] We recently stated in *People* v. *Ketchel,* 59 Cal.2d 503 at page 532 [30 Cal.Rptr. 538, 381 P.2d 394]: "'Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. (*People* v. *Nagle,* 25 Cal.2d 216, 222 [153 P.2d 344].) An indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the *possibility* that an offense has been committed and the accused is guilty of it.' (*Bompensiero* v. *Superior Court* (1955) 44 Cal.2d 178, 183-184 [281 P.2d 250], emphasis added; see also *Weber* v. *Superior Court* (1950) 35 Cal.2d 68, 69 [216 P.2d 871].) [5] 'If there is some evidence to support the indictment, the courts will not inquire into its sufficiency. . . .' (*Lorenson* v. *Superior Court* (1950) 35 Cal.2d 49, 55 [216 P.2d 859]; *Greenberg* v. *Superior Court* (1942) 19 Cal.2d 319, 322 [121 P.2d 713].)"

[3b] Unquestionably the motion to set aside the indictment on grounds of a lack of reasonable or probable cause was properly denied. [6] Resolving as we must all intendments in favor of the findings of guilt, circumstantial as it may be, we cannot fairly conclude that there is a lack of substantial evidence as to either defendant or as to any count. (See *People* v. *Robillard,* 55 Cal.2d 88, 93 [10 Cal. Rptr. 167, 358 P.2d 295, 83 A.L.R.2d 1086]; *People* v. *Love,* 53 Cal.2d 843, 850-851 [3 Cal.Rptr. 665, 350 P.2d 705].)

Both defendants also contend that the court committed prejudicial error in instructing the jury on conspiracy when no conspiracy was charged in the indictments and the prosecution did not indicate that it would try the case as a conspiracy. It is true that there was no count in conspiracy but the court nevertheless fully instructed thereon, not only a first time as a part of its general instructions but also a second time upon request by the jury after it had initially retired. If the giving of such instructions constitutes error the prejudicial effect thereof is manifest where, as in the instant case, a determination as to which of two defendants might have delivered the fatal blow is a difficult one. Furthermore, as will be seen, the question of the admissibility of certain real evidence as to one or both of the defendants depends, in part at least, upon the presence or lack of a conspiracy and the propriety of taking it into consideration.

[7] It must be deemed to be established law that "a conspiracy need not be pleaded in the indictment or information if the evidence actually shows the existence of one. (*People* v. *Ditson* (1962) 57 Cal.2d 415, 447 [22] [20 Cal.Rptr. 165, 369 P.2d 714]; *People* v. *Davis* (1957) 48 Cal.2d 241, 250 [11] [309 P.2d 1]; *People* v. *Tanner* (1935) 3 Cal.2d 279, 299 [7] [44 P.2d 324]; *People* v. *Wells* (1960) 187 Cal.App.2d 324, 329-330 [12] [9 Cal.Rptr. 384].)" (*People* v. *Pike,* 58 Cal.2d 70, 88 [22 Cal.Rptr. 664, 372 P.2d 656].) [8] In the instant case there was evidence that the parties were together in Reno where Mrs. Chapman purchased two guns; that

thereafter they remained in each other's company until after the commission of the crimes charged; that immediately before appearing at the victim's bar they departed from another bar upon Mrs. Chapman's conclusion that they were not "going to do anything here"; that they were left in the bar alone with the victim; that they departed from the tavern with the victim under unusual circumstances; that the victim entered their automobile; that while in the automobile the victim was robbed and killed with a gun of the caliber purchased by defendants; that the defendants disposed of his body and went together to a motel. Based on the foregoing and other evidence the jury could reasonably have inferred the existence of a conspiracy between the defendants to commit the crimes with which they were charged (Pen. Code, § 31), and no error is apparent in the giving of an instruction on conspiracy.

[9] Objection is further made that the instruction, as submitted by the prosecution and given by the court made reference to the "alleged conspiracy" and the "alleged conspirators." Even if we assume such references were inaccurate it does not appear that any prejudice resulted therefrom. As concluded, the conspiracy, if the jury found it to be a fact, could have been considered in determining the substantive crimes whether or not a conspiracy was alleged, and defendants were found guilty only of the substantive crimes. Nor is there any merit to defendants' further implication that they were misled by the prosecution's strategy. The People indicated during the trial in open court but out of the presence of the jury that the consequences of the conspiracy would be placed in issue if the evidence justified it.

[10] It is next asserted on the part of the defendant Teale that certain evidence was improperly admitted over objection. He objected to the admission of the gun record in the pawnshop in Reno where Mrs. Chapman made purchases, the check of Mrs. Chapman found near the body, a blue dress with blood stains thereon and the registration card for the motel in Woodland, which she signed. The objection in each

instance is based on the claim that none of the exhibits were connected with Teale personally. However, once a conspiracy has been established, evidence of the acts and declarations of the alleged conspirators individually in furtherance of that conspiracy is admissible. (*People* v. *Calhoun*, 50 Cal.2d 137, 143 [323 P.2d 427]; *People* v. *Buckley*, 202 Cal.App.2d 142, 148 [20 Cal.Rptr. 659].)

[11] Teale further contends that because the court at first sustained his objection to the introduction of the registration card he was influenced to waive his right to cross-examine the authenticating witness and that the later admission of the card, in effect, deprived him of his right of cross-examination. While the contention has some basis in theory, Teale was not precluded from recalling the witness had he reason for doing so. In any event he fails to establish the nature of the testimony he might have elicited on cross-examination and in what manner he had been prejudiced by the claimed denial. The error, if any, manifestly was not prejudicial.

[12] Both defendants further contend that the dress referred to above was improperly admitted on the further ground that the People failed to establish a foundation as to the source of the dress. It was confiscated with other clothing in Mrs. Chapman's possession at the time of her arrest in St. Joseph. She admitted at that time that the dress was her property. The impropriety is claimed to exist, however, because the People failed to establish that the dress was in Mrs. Chapman's possession or in the automobile at the time of the homicide. It appears that two cartons of personal effects were shipped to St. Joseph prior to the homicide and the implication thus raised by the objection is that the People should have established, as part of the foundation, that the dress was not a part of that shipment.

The contention raised does not go to the question of whether the real evidence offered is in fact the identical property confiscated without alteration, or to the integrity

of the chain of possession between confiscation and admission into evidence. (See *People* v. *Riser*, 47 Cal.2d 566, 580 [305 P.2d 1]; *People* v. *Nakis*, 184 Cal. 105, 113-114 [193 P. 92]; *People* v. *Lugo*, 205 Cal.App.2d 772, 776 [21 Cal. Rptr. 871].) The significance of the blood stains on the dress was a matter which the jury had the right to consider and it was for the jury to determine as a question of fact from all the evidence whether the dress had been in the automobile at the time of the homicide. (*People* v. *Adamson*, 27 Cal.2d 478, 485 [165 P.2d 3].) The dress tended to throw light on an issue in dispute and the question thus was not its admissibility but rather the weight to be accorded to it. [13] Nor was it error, as further claimed by defendants, to exclude their offer of another dress which was claimed to have been worn by Mrs. Chapman on the evening and early morning of the 17th and 18th of October. The relevancy of the dress itself was not demonstrated, and defendants were in no manner foreclosed from disputing the significance of the blood spots on the dress which was put into evidence.

[14a] Defendants next complain that they were not permitted to place before the jury for its determination evidence that the prosecution had failed to comply with a discovery order. It was brought out on cross-examination of a number of the prosecution witnesses that they had been interrogated by police officers who made notes and records of the interview and, in some cases, tape recordings. Such original notes, records and recordings were covered by the discovery order but were not made available to defendants for the stated reason that after the officers' field notes had been transcribed into integrated reports the original notes and records were discarded and tapes erased, in accordance with routine practices of the department.

There is, in fact, no basis for a reasonable belief that the prosecution withheld any information in its possession or otherwise frustrated the defendants. There is no claim that particular *information*, as distinguished from the nature of the recording thereof, has been withheld. The trial court,

however, did not let the question of the prosecution's compliance with the discovery order to get before the jury, and advised counsel that the question of compliance was for the court on proper motion in proceedings which were independent of the trial of the causes. It further advised that the question of compliance with discovery was to be distinguished from the suppression or destruction of evidence, which latter matters were pertinent for the jury's consideration.

In this regard the court invited defense counsel to submit evidence of suppression, if any they had, and instructed the jury as follows: "If the People do not present evidence which is available to them which they would naturally be expected to bring before the court, and which is not available to the defendants, you may infer, if it seems reasonable to you to do so, that this evidence would have been unfavorable to the People.

"If you find that any investigating officers wilfully concealed or destroyed evidence in order to prevent its being brought before the court in this trial, you may presume that the evidence, if presented, would have been adverse to the People's case, and you may consider such conduct in determining the merits of their case.

"Note, I do not say that any investigating officers have wilfully concealed or destroyed evidence. This is a question which you must first determine before you may consider the presumption which I have referred to."

[15] The issue raised is a novel one, and we have concluded that the question of compliance with a discovery order is not a matter for the jury's consideration providing, of course, that the jury's right to determine matters bearing on the suppression of evidence is not restricted. [14b] As stated, the record presents no ground for a reasonable belief of misconduct on the part of the prosecution in the instant case. (See *People* v. *Kroeger*, 61 Cal.2d 236, 246-247 [37 Cal. Rptr. 593, 390 P.2d 369].)

The court did not give an instruction on second degree murder or manslaughter, and instructed that defendants were either not guilty of murder at all or were guilty of murder of the first degree. It must be presumed that defendants, if guilty of murder of the first degree, were guilty under the felony murder doctrine, as no instructions on premeditation and deliberation were given. (Pen. Code, § 189.) Thus, the jury was instructed, in effect, that if it found defendants committed the unlawful killing then it must further find that the killing occurred in the perpetration of a robbery. That a robbery had been committed is uncontroverted and appears as a matter of law.

The defendant Teale's only defense was a denial of the commission of the homicide. (See *People* v. *Turville*, 51 Cal. 2d 620, 633 [335 P.2d 678]; *People* v. *Imbler*, 57 Cal.2d 711, 715 [21 Cal.Rptr. 568, 371 P.2d 304].) Mrs. Chapman, in addition to a denial, submitted evidence tending to show that she lacked mental capacity to form the requisite intent. However, such testimony was to the effect that she suffered from a "disassociative reaction"; that when she found herself in an uncontrollable situation she would " 'black out' by simply not knowing."

[16] Defendants, who did not request an instruction on second degree murder or manslaughter, now complain that the court should have given such instructions on its own motion, and that the same were required on the theory that the homicide occurred in the perpetration of a felony other than one of those mentioned in section 189 of the Penal Code, that is, simple kidnaping. Thus, it is claimed, that since the jury found a simple kidnaping as well as the robbery had occurred such additional criminal act made it incumbent upon the court to instruct on second degree murder.

The foregoing contention is obviously without merit. Where, as here, the evidence compels a conclusion that a murder, if committed at all, was committed in the perpetration of a robbery and for that reason is murder of the first degree, it does not follow that if it further appears that such

murder was committed in the perpetration of robbery *and* simple kidnaping it now becomes murder of the second degree. The fact that a second, lesser homicide has *also* been committed does not require instructions thereon where, conceding the homicide, the greater offense appears as a matter of law. The only real question before the jury was thus whether defendants were the perpetrators of the homicide.

[17] It is contended that, at least as to Mrs. Chapman, her crime might have been manslaughter because she could not have entertained the specific intent to murder, but might have entertained the lesser intents associated with involuntary manslaughter. (See *People* v. *Modesto,* 59 Cal.2d 722 [31 Cal.Rptr. 225, 382 P.2d 33].) But an objective evaluation of the defendant's evidence as to her mental capacity does not permit a reasonable conclusion that she could not have acted with "malice aforethought" (Pen. Code, § 187), and at the same time have entertained an intent to commit an "unlawful act, not amounting to a felony" or a lawful act "in an unlawful manner, or without due caution and circumspection." (Pen. Code, § 192.) According to her expert witness' testimony she did not have the mental capacity to commit any crime. Hence, the jury was properly instructed that defendants were guilty of murder of the first degree or were not guilty of the unlawful commission of any homicide.

[18] Error is claimed by Mrs. Chapman in instructions given on the effect which intoxication of an accused may bear on the question of specific intent where such intent is an element of the crime charged.[1] The challenged instruc-

[1] The portion of the instructions objected to were as follows: "Our law provides that no act committed by persons while in a state of voluntary intoxication is less criminal by reason of his or her having been in such condition. This means that such a condition, if shown by the evidence to have existed in the defendants at the time when allegedly they committed the crimes charged, is not of itself a defense. It may throw light on the occurrence and aid you in determining what took place; but when a person in a state of intoxication, voluntarily produced in himself, commits a crime, the law does not permit him to use his own vice as a shelter against the normal, legal consequences of his conduct."

tions are similar to those condemned in *People* v. *Spencer*, 60 Cal.2d 64, 86-87 [31 Cal.Rptr. 782, 383 P.2d 134]. Although further instructions which immediately followed properly stated the law, and, as in *Spencer*, "it appears that upon rather elaborate analysis a correct understanding of the relevant law can be gleaned from the instructions construed as a whole," nevertheless it was error to burden the jury with the confusing and contradicting instructions in such circumstances. However, for the reasons which follow, the error was harmless.

As in *Spencer*, the evidence of the defendant's intoxication was minimal and for that reason the erroneous instruction must be deemed nonprejudicial. (*People* v. *Spencer, supra*, 60 Cal.2d 64, 87.) Moreover, the defendant did not rely on intoxication in the ordinary sense. Her defense was that due to her emotional instability, coupled with the presence of alcohol in her system, she "blacked out", and suffered a complete mental disassociation. This theory was fully exploited by the defendant and in such circumstances the instant error on the effect of intoxication on ability to form a specific intent was not prejudicial.

[19] Defendant Chapman next claims that an instruction relating to confessions and admissions was not applicable to her, as she personally had made no such statements, and that it was prejudicial error to not so instruct the jury. In *People* v. *Burns*, 114 Cal.App.2d 566 [250 P.2d 619], it was held to be reversible error as to a nonconfessing defendant to fail to limit an instruction on confessions to his confessing codefendant. (See also, *People* v. *Wade*, 185 Cal.App.2d 226 [8 Cal.Rptr. 197].)

While it is true that the instruction on confessions and admissions was couched in general terms and, standing alone, would reasonably be construed to apply to Mrs. Chapman as well as Mr. Teale, it further appears that other instructions negated the error, if any, in the circumstances here prevailing. Moreover there was evidence of statements made by Mrs. Chapman, probably not amounting to admis-

sions, which were testified to during the trial. Mrs. Chapman also made several statements which constituted admissions but which were not put into evidence. Nevertheless, constant references were made to such statements by the various psychiatrists who testified, and defense counsel argued vigorously for the admission of an exhibit consisting of an 84-page statement by Mrs. Chapman. In each instance where a statement by Mrs. Chapman was referred to by a psychiatrist witness, the jury was admonished that the statement was not to be received as proof of the matters asserted, but only as going to the basis upon which the doctor had formulated his opinions. In addition the court instructed the jury at the close of the trial as follows: "During the course of this trial, psychiatrists have testified concerning the mental and emotional condition of defendant Ruth Chapman. During their testimony they related certain statements made by Mrs. Chapman to them. These statements were not evidence of the facts related, but were admissible only as they explained or formed a basis for the expert opinion of the psychiatrists concerning the mental and emotional condition of defendant Ruth Chapman."

It must be deemed, in view of the foregoing, that the jury was not misled as to those statements of Mrs. Chapman not received in evidence. As to extrajudicial statements which were received in evidence, the court instructed as follows immediately preceding the general instructions on confessions and admissions: "Where evidence has been received against one of the defendants but is not received as against the other, the jury may consider such evidence only as against the defendant against whom it was permitted to be received. It may not be considered by the jury for any other purpose, or against the other defendant.

"In the trial of this case, there were instances when certain evidence was admitted as against one of the defendants, but denied admission as against the other.

"Your attention was called to these matters when the rulings were made. But I would urge you again to keep in mind

the distinctions pointed out in such rulings, and their effect. It may be difficult for you, when considering the case for or against any one defendant to completely disregard any evidence that you have heard or seen, but that is your plain duty with respect to evidence not admitted by the court as against that defendant, and you must try conscientiously to so treat such a situation.

"Where evidence has been received of a statement of a defendant after his or her arrest and in the absence of his codefendant, such statements can be considered only as evidence against the defendant who made such statement and cannot be considered for any purpose as evidence against the codefendant.

"If in this trial any evidence has been received of a statement or admission of Thomas Leroy Teale after his arrest and in the absence of his codefendant, such statement can be considered only as evidence against Mr. Teale and cannot be considered for any purpose as evidence against Ruth Elizabeth Chapman.

"Likewise any evidence of a statement or admission of Ruth Elizabeth Chapman after her arrest and in the absence of her codefendant can be considered only as evidence against Mrs. Chapman and cannot be considered for any purpose as evidence against Thomas Leroy Teale."

In view of the foregoing specific instructions immediately preceding the general instructions on admissions and confessions we are persuaded to the conclusion that the jury reasonably could not have applied either Mrs. Chapman's excluded extrajudicial statements or the admissions which the defendant Teale made to his fellow inmate in determining the individual guilt of Mrs. Chapman.

No contention is made that any of the extrajudicial statements were received in evidence in violation of defendants' right to counsel as enunciated in *Escobedo* v. *Illinois*, 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977], *Massiah* v. *United States*, 377 U.S. 201 [84 S.Ct. 1199, 12 L.Ed.2d 246], and

People v. *Dorado*, [a]62 Cal.2d 338 [42 Cal.Rptr. 169, 398 P.2d 361], and it otherwise does not appear that defendants' rights in this regard have been infringed. In any event, aside from Teale's statement to his fellow inmate, which clearly falls outside the proscription of *Escobedo*, *Massiah* and *Dorado*, the admission of other statements could not have resulted in a miscarriage of justice. (Cal. Const., art. VI, § 4½.)

[20] As stated, neither defendant testified in his or her own behalf in the exercise of their constitutional privilege. This failure to testify was not commented upon by the prosecuting attorney, but the court, in instructions to the jury and in accordance with the California constitutional provision (Cal. Const., art. I, § 13) stated, among other things, that the failure of defendants to testify from facts within their knowledge in explanation of incriminating evidence, may be deemed as tending to indicate the truth of such incriminating evidence and "that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."

The foregoing comment has been ruled in violation of the Fifth and Fourteenth Amendments. (*Griffin* v. *California*, —— U.S. —— [85 S.Ct. ——, 14 L.Ed.2d 106]; *Malloy* v. *Hogan*, 378 U.S. 1 [84 S.Ct. 1489, 12 L.Ed.2d 653]), but the question remains whether in any particular instance the error in making such comment has resulted in a miscarriage of justice requiring a reversal of the judgment of conviction. (*People* v. *Bostick*, [b]62 Cal.2d ——, ——, —— [44 Cal.Rptr. 649, 402 P.2d 529].)

It clearly appears that the error in giving the improper instruction could not have resulted in a miscarriage of justice as to the defendant Teale. While he may not have confessed to the crime, nevertheless the admissions which he made to his fellow inmate are so damaging that, when con-

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[a] Advance Report Citation: 62 A.C. 350.

[b] Advance Report Citation: 62 A.C. 869, 872-876.

sidered with the other substantial evidence, the fact of his guilt must be deemed overwhelming. His statements, of course, were not admissible against the defendant Chapman. Nevertheless the persuasive, circumstantial web of evidence which implicated her was not refuted, and the only real defense which she urged at the trial level was her claimed inability to form a criminal intent, which she sought to establish through expert witnesses. The comment on her failure to explain away the circumstantial web of evidence, becomes of less significance in view of the defense's complete failure to refute such evidence by any means whatsoever. That evidence, in effect, stands unchallenged and the comment adds little to its stature. Moreover, we are unable to discern what bearing, if any, the comment would have on the defense of an inability to form the requisite intent, as interposed by Mrs. Chapman. This being a technical defense based upon expert opinion, comments on her failure to testify could not be material thereto. In view of the almost complete failure to submit *any* rebuttal, the rather innocuous instruction added little which was not already apparent to the jurors, that is, the defendants were not disposed to question the truth of the facts asserted by the prosecution's witnesses.

We are therefore of the opinion that in the absence of the erroneous comment a result more favorable to defendants was not reasonably probable in view of the entire record (*People* v. *Watson*, 46 Cal.2d 818, 836 [299 P.2d 243]), and that there has been no miscarriage of justice as to either Mrs. Chapman or Mr. Teale.

We further conclude that numerous other contentions of procedural errors, generally dealing with the court's ruling on evidentiary matters, to be lacking in merit either for the reason that the ruling was not in error or that the matter was so trivial as to be nonprejudicial.

[21] Contention is also made by the defendant Teale that prejudicial error occurred in the penalty phase in the court's

instructions, and the prosecutor's arguments going to the role played by the Adult Authority in fixing parole for those convicts sentenced to life terms. (*People* v. *Morse*, 60 Cal. 2d 631 [36 Cal.Rptr. 201, 388 P.2d 33].) However, the instructions and arguments fall far short of those condemned in *Morse*.

The instruction to which exception is taken is as follows: "Further the law of this state provides that every person guilty of murder of the first degree shall suffer death or confinement in the state prison for life with the possibility of parole." And the language of the prosecutor to which particular objection is taken is as follows: "For example, if you feel that a term in prison, for example —, with all of the facilities for rehabilitation and so forth, would insure, insofar as human reason can infer, that these defendants, even if they are ultimately and they will be one day perhaps—there is a possibility if they are—the death penalty is not invoked, possibly they may be paroled.—They may not be, but again they may be. It is the law."

The jury was not advised of the role which the Adult Authority plays, the conditions under which parole is granted, statistical information relative to past and current practices in granting parole, or any of the other matters condemned in *Morse* as improper for the jury to consider. Insofar as appears the jury was advised only that a convict undergoing a life sentence might someday be paroled and the further obvious inference might be drawn from the prosecutor's remarks that if the death penalty is invoked there is no possibility of parole. Manifestly, the invitation to the jury to speculate and surmise as to the improper release of a defendant to society in the future if a life instead of a death sentence is imposed, upon which *Morse* turned, is completely lacking in the instant case.

[22] As the evidence clearly indicates that all of the crimes charged and of which Mrs. Chapman stands convicted are inseparable, she was improperly sentenced for all three counts. (*People* v. *McFarland*, 58 Cal.2d 748 [26 Cal.Rptr.

473, 376 P.2d 449]; *People* v. *Houston*, 219 Cal.App.2d 187 [33 Cal.Rptr. 26].) Thus the judgment, insofar as it imposes punishment for robbery and kidnaping, the lesser crimes, must be reversed as to Mrs. Chapman. As the death penalty was imposed on the defendant Teale he is not affected by multiple sentencing. (*People* v. *Seiterle*, 59 Cal. 2d 703, 712 [31 Cal.Rptr. 67, 381 P.2d 947].)

The judgment is reversed insofar as it imposes sentences for robbery and kidnaping on Mrs. Chapman, and in all other respects is affirmed. The judgment as to the defendant Teale is affirmed in all respects.

Traynor, C. J., McComb, J., Peters, J., Tobriner, J., Schauer, J.,* and Dooling, J.,* concurred.

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* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

APPENDIX B

Opinion of Supreme Court of California Modifying Original Decision

[63 A.C. No. 8, page 269]

[Crim. No. 7577. In Bank. Aug. 27, 1965.]

THE PEOPLE, *Plaintiff and Respondent,* v. THOMAS LEROY TEALE and RUTH ELIZABETH CHAPMAN, *Defendants and Appellants.*

[Modification* of opinion (63 A.C. 175, —— Cal.Rptr. ——).]

[20] *Id.—Appeal—Harmless Error—Misconduct of Prosecutor—Comment on Defendants' Failure to Testify: Instructions.*—Though the prosecutor, in his final argument, erroneously commented on, and the court, in an instruction, erroneously made statements concerning, codefendants' failure to testify, the errors did not result in a miscarriage of justice where the evidence of one defendant's guilt was overwhelming, and the comments and instruction added little to the unchallenged, persuasive and circumstantial web of evidence against the other defendant and had no bearing on her defense of inability to form the requisite intent.

THE COURT.—The opinion herein, appearing in 63 A.C. 175, is modified by striking four paragraphs, beginning with the words "As stated" at the bottom of page 192, and ending with the end of the second paragraph on page 194, and substituting in lieu thereof the following:

[20] As stated, neither defendant testified in his or her own behalf in the exercise of their constitutional privilege. The prosecuting attorney, during his summation to the jury,

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McK. Dig. References: [20] Criminal Law, §§ 1404(17), 1435.

*This modification requires deletion of old headnote [20] and substitution of new headnote [20].

commented on numerous occasions regarding the failure of either defendant to explain certain factual matters established by independent evidence. Such comments went to the motives for the procurement and handling of guns purchased by Mrs. Chapman, funds or the lack thereof in Mr. Teale's possession immediately prior to the killing, the amount of intoxicating liquors consumed by defendants at the Spot Club and other taverns, the circumstances of the shooting in the automobile and the removal of the victim's body therefrom, who fired the fatal shots, why defendants used a false registration at a motel shortly after the killing, the meaning of a letter written by Mrs. Chapman several days after the killing, why Teale had a loaded weapon in his possession when apprehended, the meaning of statements made by Teale after his apprehension, why certain clothing and articles of personal property were shipped by defendants to Missouri, what clothing Mrs. Chapman wore at the time of the killing, conflicting statements as to Mrs. Chapman's whereabouts immediately preceding the killing and, generally, the overall commission of the crime. In addition to the foregoing the court, in instructions to the jury and in accordance with the California Constitution provision (Cal. Const., art. I, § 13), stated, among other things, that the failure of defendants to testify from facts within their knowledge in explanation of incriminating evidence, may be deemed as tending to indicate the truth of such incriminating evidence and "that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."

The foregoing comments and instructions have been ruled in violation of the Fifth and Fourteen Amendments (*Griffin* v. *California,* 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106], *Malloy* v. *Hogan,* 378 U.S. 1 [84 S.Ct. 1489, 12 L.Ed. 2d 653]), but the question remains whether in any particular instance the error in allowing such comments and in giving such instruction has resulted in a miscarriage of justice requiring a reversal of the judgment of conviction. (*People* v. *Bostick,* [a]62 Cal.2d 820, 823-827 [44 Cal. Rptr. 649, 402 P.2d 529].)

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[a] Advance Report Citation: 62 A.C. 869, 872-876.

It clearly appears that the error in allowing the comments and in giving the improper instruction could not have resulted in a miscarriage of justice as to the defendant Teale. While he may not have confessed to the crime, nevertheless the admissions which he made to his fellow inmate are so damaging that, when considered with the other substantial evidence, the proof of his guilt must be deemed overwhelming. His statements, of course, were not admissible against the defendant Chapman. Nevertheless the persuasive, circumstantial web of evidence which implicated her was not refuted, and the only real defense which she urged at the trial level was her claimed inability to form a criminal intent, which she sought to establish through expert witnesses. The comments and instructions on her failure to explain away the circumstantial web of evidence become of less significance in view of the defense's complete failure to refute such evidence by any means whatsoever. That evidence, in effect, stands unchallenged and the prosecutor's and court's remarks add little to its stature. Moreover, we are unable to discern what bearing, if any, the remarks would have on the defense of an inability to form the requisite intent, as interposed by Mrs. Chapman. This being a technical defense based upon expert opinion, comments on her failure to testify could not be material thereto. In view of the almost complete failure to submit *any* rebuttal, the comments and instruction added little which was not already apparent to the jurors, that is, the defendants were not disposed to question the truth of the facts asserted by the prosecution's witnesses.

We are therefore of the opinion that in the absence of the erroneous comments and instructions a result more favorable to defendants was not reasonably probable in view of the entire record (*People* v. *Watson*, 46 Cal.2d 818, 836 [299 P.2d 243]), and that there has been no miscarriage of justice as to either Mrs. Chapman or Mr. Teale.

APPENDIX C

Opinion of Supreme Court of California, as Modified

[63 Cal.2d 178]

[Crim. No. 7577. In Bank. July 16, 1965.]

THE PEOPLE, *Plaintiff and Respondent*, v. THOMAS LEROY TEALE and RUTH ELIZABETH CHAPMAN, *Defendants and Appellants*.

[1a, 1b] *Criminal Law—Time of Trial—Right to Speedy Trial.*—Defendant was not denied her constitutional right to a speedy trial where she voluntarily waived the 60-day limit (Pen. Code, § 1382, subd. 2), and the trial date was postponed to permit substitution of counsel to prevent a conflict of interests; the delay, if error, was not prejudicial though defendant asserted it caused her emotional upset that persuaded her not to testify, where she failed to show how her testimony would have aided her cause.

[2] *Id.—Time of Trial—Continuances.*—A continuance granted on good cause to a codefendant is generally deemed not to prejudice other defendants.

[3a, 3b] *Indictment and Information—Defects—Motion to Set Aside—Insufficiency of Evidence.*—A motion to set aside an indictment for kidnaping, robbery and

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[1] See *Cal.Jur.2d*, Criminal Law, § 125 et seq.; *Am.Jur.2d*, Criminal Law, § 241 et seq.

McK. Dig. References: [1] Criminal Law, § 238; [2] Criminal Law, § 250; [3, 5] Indictment and Information, § 88(7); [4] Indictment and Information, § 88(7); Prohibition, § 43; [6] Homicide, § 145(1); [7] Conspiracy, § 18; [8] Conspiracy, § 25(1); [9] Conspiracy, § 25(13); [10] Conspiracy, § 20(1); [11] Criminal Law, § 1382(22) [12, 13] Homicide, § 120; [14] Criminal Law, § 104.5; [15] Criminal Law, § 635; [16] Homicide, § 188; [17] Homicide, § 185; [18] Criminal Law, § 1421; [19] Criminal Law, § 1434; [20] Criminal Law, §§ 1404(17), 1435; [21] Criminal Law, § 1011.1; [22] Criminal Law, § 1475.

murder for lack of reasonable or probable cause was properly denied where it was shown that persons resembling defendants were observed with the victim shortly before the murder, that the bar the victim tended was robbed, that the victim's body was found in a ditch, and that the bullet wounds in the victim's head were inflicted by the caliber of gun purchased by one defendant.

[4] *Id.—Defects—Motion to Set Aside: Prohibition—Criminal Proceedings.*—Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of an accused's guilt, and an indictment will not be set aside or prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.

[5] *Id.—Defects—Motion to Set Aside—Insufficiency of Evidence.*—If there is some evidence to support an indictment, courts will not inquire into its sufficiency.

[6] *Homicide — Evidence — Circumstantial Evidence.*—Though circumstantial, evidence of first degree murder was substantial where it was shown that persons resembling defendants were seen with the victim on the night of the murder, that the bar tended by the victim was robbed, that the victim's body was found in an open ditch with bullet wounds in the head made by a gun of a caliber purchased by one defendant, that blood of the victim's type was in defendants' car and on their clothes and fibers from the victim's shoes matched those found in the car, that hairs matching the victim's were found in the car, that red paint on the car's floor mat came from the victim's shoes, and that one defendant told a fellow prisoner that the other defendant committed the murder.

[7] *Conspiracy—Criminal—Indictment and Information —Proof and Variance.*—A conspiracy need not be pleaded in an indictment or information where the evidence actually shows the existence of conspiracy.

[8] *Id.—Criminal—Instructions.*—To instruct on conspiracy was not error, though conspiracy was not charged, where there was evidence that defendants, who purchased guns before a murder, stayed together until after the murder, that they were with the victim, and that the victim was killed with the same caliber of gun as one they purchased.

[9] *Id.—Criminal—Instructions.*—In a prosecution for murder, kidnaping and robbery, assuming that references in instructions to the "alleged conspiracy" and the "alleged conspirators" were inaccurate, no prejudice resulted where the jury could consider the conspiracy, if it found it to be a fact, in determining the substantive crimes, regardless of whether a conspiracy was alleged, and defendants were found guilty only of the substantive crimes.

[10] *Id.—Criminal—Evidence—Acts of Coconspirators.*—In a prosecution of codefendants for murder, once a conspiracy was established between them, evidence of the purchase of a gun by one defendant, of a check with her name near the victim's body, her dress with bloodstains, and a registration card signed by her for a motel near the murder scene were admissible, though not personally connected with her codefendant.

[11] *Criminal Law — Appeal — Harmless Error — Evidence.*—Any error in admitting documentary evidence after it was first refused and defendant waived his right to cross-examine the authenticating witness was not prejudicial where defendant was not precluded from recalling the witness and failed to estab-

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[7] See *Cal.Jur.2d,* Conspiracy, § 20 et seq.; *Am.Jur.2d,* Conspiracy, § 20 et seq.

lish the nature of the testimony he might have elicited on cross-examination and in what manner he was prejudiced by the claimed denial.

[12] *Homicide—Evidence—Demonstrative Evidence.*—In a murder case, a defendant's dress stained with blood of the victim's type tended to throw light on an issue in dispute and the jury had a right to determine whether the dress was in defendant's car at the time of the homicide.

[13] *Id.—Evidence—Demonstrative Evidence.*—In a murder case in which the People introduced one defendant's dress stained with blood of the victim's type, it was not error to exclude defendants' offer of another dress that was claimed to have been worn by defendant about the time the murder took place where the relevancy of the dress was not demonstrated and defendants were not foreclosed from disputing the significance of the blood spots on the dress put in evidence.

[14a, 14b] *Criminal Law—Rights of Accused—Rights of Discovery and Inspection.*—The prosecutor was not guilty of misconduct in failing to comply with a discovery order for inspection of notes and records of interviews by the police with prosecution witnesses where they were not made available to defendants for the stated reason that after officers' field notes were transcribed into integrated reports, the original notes and records were discarded and tapes erased, in accordance with routine practices of the department.

[15] *Id.—Province of Court and Jury—Compliance With Discovery Orders.*—The compliance or failure to comply with a discovery order is not a matter for the jury's consideration, providing its right to determine matters bearing on the suppression of evidence is not restricted.

[16] *Homicide—Instructions—Killing in Perpetration of Certain Felonies.*—Where a murder, if committed at all, was committed in the perpetration of a robbery as a matter of law and for that reason is murder in the first degree, and it further appears that such murder was committed in the perpetration of robbery *and* simple kidnaping, the fact that a second, lesser homicide was also committed did not require the court to instruct on its own motion on second degree murder.

[17] *Id.—Instructions—Murder.*—Where there was expert testimony that defendant did not have the mental capacity to commit any crime and evidence that defendant killed the victim in the perpetration of a robbery, the jury was properly instructed that defendant was guilty of first degree murder or not guilty.

[18] *Criminal Law—Appeal—Harmless Error—Instructions.*—In a prosecution for a murder committed in the perpetration of robbery, though it was error to give confusing and contradictory instructions on the effect that defendant's intoxication might bear on specific intent, the instruction was nonprejudicial where the evidence of defendant's intoxication was minimal.

[19] *Id.—Appeal—Harmless Error—Instructions.*—In a prosecution of codefendants, though an instruction on admissions and confessions applied only to one defendant, any error in couching the instruction in general terms so that it could reasonably be construed to apply to both defendants was negated where the defendant to whom it did not apply had made admissions, not put in evidence, to psychiatrists who testified and referred to such admissions, but the

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[16] See *Cal.Jur.2d*, Homicide, § 77; *Am.Jur.*, Homicide (1st ed. § 64).

jury was admonished at the time and at the close of trial to consider the admissions only as going to the basis of the doctors' opinions.

[20] *Id. — Appeal — Harmless Error — Misconduct of Prosecutor—Comment on Defendants' Failure to Testify: Instructions.*—Though the prosecutor, in his final argument, erroneously commented on, and the court, in an instruction, erroneously made statements concerning, codefendants' failure to testify, the errors did not result in a miscarriage of justice where the evidence of one defendant's guilt was overwhelming, and the comments and instruction added little to the unchallenged persuasive and circumstantial web of evidence against the other defendant and had no bearing on her defense of inability to form the requisite intent.

[21] *Id.—Proceeding for Determining Penalty.*—In discussing life imprisonment and the death penalty on the penalty phase of a first degree murder case, the prosecutor's advice that only a convict undergoing a life sentence might someday be paroled, from which the obvious inference could be drawn that there was no possibility of parole should the death penalty be invoked, fell far short of the prejudicial error in inviting the jury to speculate and surmise on the improper future release of a defendant should a life sentence be imposed.

[22] *Id.—Double Punishment.*—Where the evidence indicated that defendant's crimes of murder, robbery and kidnaping were inseparable, defendant was improperly sentenced on all three counts and the judgment, imposing punishment for robbery and kidnaping, must be reversed.

APPEALS (one automatically taken under Pen. Code, § 1239, subd. (b)) from a judgment of the Superior Court of San Joaquin County. William Biddick, Jr., Judge. Judgment

affirmed in part and reversed in part as to one defendant and affirmed as to the other defendant; purported appeal from order denying new trial dismissed.

Prosecution for murder, robbery and kidnaping. As to defendant on automatic appeal, judgment of conviction affirmed in all respects; as to other defendant, judgment of conviction of first degree murder, first degree robbery and simple kidnaping reversed insofar as it imposed sentences for robbery and kidnaping and affirmed in all other respects.

Nels B. Fransen, Thomas R. Krehbiel and Richard E. Johnson, under appointment by the Supreme Court, and Simonelli & Fransen for Defendants and Appellants.

Stanley Mosk and Thomas C. Lynch, Attorneys General, Doris H. Maier, Assistant Attorney General, and Raymond M. Momboisse, Deputy Attorney General, for Plaintiff and Respondent.

PEEK, J.—Defendants Thomas L. Teale and Ruth Elizabeth Chapman were convicted by a jury of the first degree murder of Billy Dean Adcock, robbery of the first degree and simple kidnaping. A life sentence was imposed upon the defendant Chapman as to the murder count and she appeals from the whole of the judgment. The death penalty was imposed upon the defendant Teale, and his appeal is automatic pursuant to the provisions of section 1239, subdivision (b) of the Penal Code. The order denying defendants' motion for a new trial being nonappealable, the defendant Chapman's purported appeal therefrom must be dismissed. (Pen. Code, § 1237.)

On October 17, 1962, defendants registered at a motel in Fresno, where they gave a bad check in payment of their room rental. At approximately 10 p.m. on that same day they entered a tavern near Lodi where they remained for nearly three hours and together consumed five bottles of beer. Mrs. Chapman went outside for awhile and upon her return was heard to say to Teale: "Let's go, we are not going to do anything here," or "We can't do anything here, let's go." They then left the tavern together.

Defendants next appeared at about 2 a.m. the following day at the "Spot Club" in Lodi. The only persons in the bar at that time were the defendants and Adcock, the bartender. Shortly thereafter three persons, including the bartender and a woman of Mrs. Chapman's general description, were observed in front of the Spot Club. The third person in the group, a man resembling the defendant Teale in general appearance, was standing behind the bartender, who apparently was locking the door of the tavern.

The following morning the owner of the bar found it to be in unusual disarray. The cash register had been broken into and approximately $260 was missing. Papers usually kept in the register were scattered about the floor. Routine housekeeping tasks which the bartender generally completed before leaving had not been performed.

Later that morning the victim's body was found in a remote area north of Lodi. It was half submerged in an open ditch by the side of a road. The clothing was torn and there was blood on the face and on the surface of the road nearby. The victim had been shot three times in the head, two bullets apparently penetrating through the same wound on the left side of the head from a gun held as close as two inches. The third bullet entered the back of the head from a gun held some 18 inches away. The time of death from the gunshot wounds was estimated at 3 on the morning of the 18th.

The bullets which inflicted the deceased's wounds were fired from a .22 caliber weapon similar to a gun purchased by the defendant Chapman in Reno, Nevada, while there with Teale six days before the killing. Neither the gun which she purchased, nor the gun which fired the fatal bullets was located.

Numerous items of personal property were found in the vicinity of the body, including the victim's wallet from which $50 to $65 in cash had been removed, and a check for $2.00 bearing a stamp "Refer to Maker," which had been signed by Mrs. Chapman.

Evidence connecting defendants with the commission of the crime was submitted by an expert witness for the People

who testified that the victim's blood was Type A; that Type A blood was found on the right side of the front floor mat, spattered on the overhead fabric liner, the dome light and clothes rack in the back of defendants' vehicle; that blood had spattered or radiated out from the right front side of the automobile; that Type A blood was found on Mrs. Chapman's fur stole and spattered on a dress, blouse, skirt and shoes in her possession; that Type A blood was also found on defendant Teale's shirt and jacket; that numerous fibers taken from the victim's shoes matched those found in the defendants' automobile, that hairs were found in the automobile which matched those of the victim; that red paint found on the floor mat of the defendants' automobile came from the shoes of the victim, and that in the opinion of the expert the victim had been in the defendants' automobile.

Defendant Teale was arrested in New Orleans on November 2, 1962. At that time he carried a gun which had been purchased by Mrs. Chapman in Reno on the same day on which she purchased the .22 caliber weapon hereinbefore mentioned, and he was driving the automobile which had been in the defendants' possession before and at the time of the killing.

After his return to California Teale was confined with one Waldo Vowel, another prisoner, who testified as to a conversation he had with Teale wherein Teale stated that "he hoped Mrs. Chapman did not break down and start saying anything, because they didn't have anything on them yet." Later, the witness testified, he had another conversation with Teale in the prison yard: "I told him I knew Bill [the deceased], and he [Teale] told me he didn't plan for it to happen that way, and he started relating to me how it happened. He said that they were arguing over money all afternoon, and he said it was his idea to rob him and said he was going to take him out in the country and just run him off up through the vineyard, or something like that, but had no idea of killing him. But he said when they pulled up and stopped, that he opened the door, he didn't say who was driving or

nothing, just said when they stopped that he got out to go around—go around to the other side of the car to get Adcock out, and said that Mrs. Chapman shot him once in the back of the head, and then said when he fell, before he could get around the car, he said she shot him two more times."

Teale further stated, according to the witness, that "they" would never find the gun. In response to a question as to any statements Teale might have made regarding expected punishment, the witness stated: "Well, he said out there in the yard, he said if they had anything on him, he said he was going anyway, and he didn't want Mrs. Chapman to 'cop out' or anything, because he said if she didn't, you'd have to prove which one of them done it. Said he was going anyway, it didn't make any difference. So he said if she just kept quiet that she might get off with just seven or eight years." The foregoing testimony of conversations had with Teale was received under an admonition that the jurors could consider it only as to Teale. No claim is made and the record does not disclose that Teale's fellow prisoner was acting in complicity with the state.

Mrs. Chapman was arrested by an agent of the Federal Bureau of Investigation in St. Joseph, Missouri, on October 26, 1962, and thereafter gave conflicting accounts to the officer of her whereabouts on October 17 and 18. She stated first that she had been in Ukiah from the 17th to the 20th of October, on which latter date she left by bus for St. Joseph. She later stated that on the evening of the 17th and early morning of the 18th she had waited in a bus depot in San Francisco. However it was stipulated at the trial that a registration card for occupancy of a motel room by a "Mr. and Mrs. T. L. Rosenthal" in Woodland at 4:40 a.m. on October 18, was made out in her handwriting. The clerk of the motel also testified that the registrant gave a false license number, and that the automobile in which the parties arrived was the one found in Teale's possession upon his arrest.

The record is mute as to the factual basis for certain of the requirements which must be satisfied before testimony

of Mrs. Chapman's statements could have been properly introduced by the prosecution. However, the conflicting testimony relative to her whereabouts on October 17 and 18 was elicited on direct examination from the federal agent appearing as a witness for Mrs. Chapman. On cross-examination the officer testified, relative to the conflict in her statements, that she denied she suffered from "blackouts."

Neither defendant appeared as a witness.

[1a] Mrs. Chapman's first contention, that she was denied her constitutional right to a speedy trial, is not borne out by the record. She voluntarily waived the 60-day limit (Pen. Code, § 1382, subd. 2) and trial was set for February 5, 1963. On that date appointed counsel, the public defender, withdrew due to a conflict in interest in his representation of both her and the defendant Teale. New counsel appointed for Mrs. Chapman on February 5 instituted discovery proceedings and trial was postponed until March 19, presumably in the defendant's interest. (*People* v. *Donohoe,* 200 Cal.App.2d 17 [19 Cal.Rptr. 454].) Prior to the March 19 trial date Mrs. Chapman filed an affidavit that the public defender's prior representation of her would prejudice her right if a joint trial was had, and the court permitted the public defender to withdraw as counsel for Teale also. New counsel was appointed for Teale and trial was again postponed, to give such counsel an opportunity to prepare, until April 16, when trial was had.

[2] Where a continuance is granted upon good cause to a codefendant the rights of the other defendants are generally not deemed to have been prejudiced. (*People* v. *McFarland,* 209 Cal.App.2d 772 [26 Cal.Rptr. 596]; *Ferenz* v. *Superior Court,* 53 Cal.App.2d 639 [128 P.2d 48].) [1b] Moreover, assuming without concluding that there was an improper denial of a speedy trial, the error must be prejudicial to merit a reversal therefor. (*People* v. *Wilson,* 60 Cal.2d 139, 152 [32 Cal.Rptr. 44, 383 P.2d 452].) Although Mrs. Chapman asserts that the delay caused her an emotional upset which

persuaded her not to testify in her own behalf she still fails to show how her testimony would have aided her cause.

Both defendants contend that the evidence is insufficient to justify the verdicts. The defendant Teale further contends that the evidence presented to the grand jury failed to establish reasonable or probable cause to hold him to answer for the crimes charged. Teale unsuccessfully moved in the trial court to set aside the indictment on grounds of insufficiency (see Pen. Code, § 995), and his petition for prohibition upon the ground that the indictment was found without reasonable or probable cause was denied by the District Court of Appeal (see Pen. Code, § 999a). [3a] The evidence before the grand jury was substantially the same as that herein recited other than that of the People's expert witness and the fellow prisoner to whom Teale made certain admissions. [4] We recently stated in *People* v. *Ketchel,* 59 Cal.2d 503 at page 532 [30 Cal.Rptr. 538, 381 P.2d 394]: " 'Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. (*People* v. *Nagle,* 25 Cal.2d 216, 222 [153 P.2d 344].) An indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the *possibility* that an offense has been committed and the accused is guilty of it.' (*Bompensiero* v. *Superior Court* (1955) 44 Cal.2d 178, 183-184 [281 P.2d 250], emphasis added; see also *Weber* v. *Superior Court* (1950) 35 Cal.2d 68, 69 [216 P.2d 871].) [5] 'If there is some evidence to support the indictment, the courts will not inquire into its sufficiency. . . .' (*Lorenson* v. *Superior Court* (1950) 35 Cal.2d 49, 55 [216 P.2d 859]; *Greenberg* v. *Superior Court* (1942) 19 Cal.2d 319, 322 [121 P.2d 713].)"

[3b] Unquestionably the motion to set aside the indictment on grounds of a lack of reasonable or probable cause was properly denied. [6] Resolving as we must all intendments in favor of the findings of guilt, circumstantial as it may be, we cannot fairly conclude that there is a lack of

substantial evidence as to either defendant or as to any count. (See *People* v. *Robillard,* 55 Cal.2d 88, 93 [10 Cal. Rptr. 167, 358 P.2d 295, 83 A.L.R.2d 1086]; *People* v. *Love,* 53 Cal.2d 843, 850-851 [3 Cal.Rptr. 665, 350 P.2d 705].)

Both defendants also contend that the court committed prejudicial error in instructing the jury on conspiracy when no conspiracy was charged in the indictments and the prosecution did not indicate that it would try the case as a conspiracy. It is true that there was no count in conspiracy but the court nevertheless fully instructed thereon, not only a first time as a part of its general instructions but also a second time upon request by the jury after it had initially retired. If the giving of such instructions constitutes error the prejudicial effect thereof is manifest where, as in the instant case, a determination as to which of two defendants might have delivered the fatal blow is a difficult one. Furthermore, as will be seen, the question of the admissibility of certain real evidence as to one or both of the defendants depends, in part at least, upon the presence or lack of a conspiracy and the propriety of taking it into consideration.

[7] It must be deemed to be established law that "a conspiracy need not be pleaded in the indictment or information if the evidence actually shows the existence of one. (*People* v. *Ditson* (1962) 57 Cal.2d 415, 447 [22] [20 Cal.Rptr. 165, 369 P.2d 714]; *People* v. *Davis* (1957) 48 Cal.2d 241, 250 [11] [309 P.2d 1]; *People* v. *Tanner* (1935) 3 Cal.2d 279, 299 [7] [44 P.2d 324]; *People* v. *Wells* (1960) 187 Cal.App.2d 324, 329-330 [12] [9 Cal.Rptr. 384].)" (*People* v. *Pike,* 58 Cal.2d 70, 88 [22 Cal.Rptr. 664, 372 P.2d 656].) [8] In the instant case there was evidence that the parties were together in Reno where Mrs. Chapman purchased two guns; that thereafter they remained in each other's company until after the commission of the crimes charged; that immediately before appearing at the victim's bar they departed from another bar upon Mrs. Chapman's conclusion that they were not "going to do anything here"; that they were left in the bar alone with the victim; that they departed from the tav-

ern with the victim under unusual circumstances; that the victim entered their automobile; that while in the automobile the victim was robbed and killed with a gun of the caliber purchased by defendants; that the defendants disposed of his body and went together to a motel. Based on the foregoing and other evidence the jury could reasonably have inferred the existence of a conspiracy between the defendants to commit the crimes with which they were charged (Pen. Code, § 31), and no error is apparent in the giving of an instruction on conspiracy.

[9] Objection is further made that the instruction, as submitted by the prosecution and given by the court made references to the "alleged conspiracy" and the "alleged conspirators." Even if we assume such references were inaccurate it does not appear that any prejudice resulted therefrom. As concluded, the conspiracy, if the jury found it to be a fact, could have been considered in determining the substantive crimes whether or not a conspiracy was alleged, and defendants were found guilty only of the substantive crimes. Nor is there any merit to defendants' further implication that they were misled by the prosecution's strategy. The People indicated during the trial in open court but out of the presence of the jury that the consequences of the conspiracy would be placed in issue if the evidence justified it.

[10] It is next asserted on the part of the defendant Teale that certain evidence was improperly admitted over objection. He objected to the admission of the gun record in the pawnshop in Reno where Mrs. Chapman made purchases, the check of Mrs. Chapman found near the body, a blue dress with blood stains thereon and the registration card for the motel in Woodland, which she signed. The objection in each instance is based on the claim that none of the exhibits were connected with Teale personally. However, once a conspiracy has been established, evidence of the acts and declarations of the alleged conspirators individually

in furtherance of that conspiracy is admissible. (*People* v. *Calhoun*, 50 Cal.2d 137, 143 [323 P.2d 427]; *People* v. *Buckley*, 202 Cal.App.2d 142, 148 [20 Cal.Rptr. 659].)

[11] Teale further contends that because the court at first sustained his objection to the introduction of the registration card he was influenced to waive his right to cross-examine the authenticating witness and that the later admission of the card, in effect, deprived him of his right of cross-examination. While the contention has some basis in theory, Teale was not precluded from recalling the witness had he reason for doing so. In any event he fails to establish the nature of the testimony he might have elicited on cross-examination and in what manner he had been prejudiced by the claimed denial. The error, if any, manifestly was not prejudicial.

[12] Both defendants further contend that the dress referred to above was improperly admitted on the further ground that the People failed to establish a foundation as to the source of the dress. It was confiscated with other clothing in Mrs. Chapman's possession at the time of her arrest in St. Joseph. She admitted at that time that the dress was her property. The impropriety is claimed to exist, however, because the People failed to establish that the dress was in Mrs. Chapman's possession or in the automobile at the time of the homicide. It appears that two cartons of personal effects were shipped to St. Joseph prior to the homicide and the implication thus raised by the objection is that the People should have established, as part of the foundation, that the dress was not a part of that shipment.

The contention raised does not go to the question of whether the real evidence offered is in fact the identical property confiscated without alteration, or to the integrity of the chain of possession between confiscation and admission into evidence. (See *People* v. *Riser*, 47 Cal.2d 566, 580 [305 P.2d 1]; *People* v. *Nakis*, 184 Cal. 105, 113-114 [193 P. 92]; *People* v. *Lugo*, 203 Cal.App.2d 772, 776 [21 Cal.Rptr.

871].) The significance of the blood stains on the dress was a matter which the jury had the right to consider and it was for the jury to determine as a question of fact from all the evidence whether the dress had been in the automobile at the time of the homicide. (*People* v. *Adamson*, 27 Cal.2d 478, 485 [165 P.2d 3].) The dress tended to throw light on an issue in dispute and the question thus was not its admissibility but rather the weight to be accorded to it. [13] Nor was it error, as further claimed by defendants, to exclude their offer of another dress which was claimed to have been worn by Mrs. Chapman on the evening and early morning of the 17th and 18th of October. The relevancy of the dress itself was not demonstrated, and defendants were in no manner foreclosed from disputing the significance of the blood spots on the dress which was put into evidence.

[14a] Defendants next complain that they were not permitted to place before the jury for its determination evidence that the prosecution had failed to comply with a discovery order. It was brought out on cross-examination of a number of the prosecution witnesses that they had been interrogated by police officers who made notes and records of the interview and, in some cases, tape recordings. Such original notes, records and recordings were covered by the discovery order but were not made available to defendants for the stated reason that after the officers' field notes had been transcribed into integrated reports the original notes and records were discarded and tapes erased, in accordance with routine practices of the department.

There is, in fact, no basis for a reasonable belief that the prosecution withheld any information in its possession or otherwise frustrated the defendants. There is no claim that particular *information*, as distinguished from the nature of the recording thereof, has been withheld. The trial court, however, did not let the question of the prosecution's compliance with the discovery order get before the jury, and advised counsel that the question of compliance was for the court on proper motion in proceedings which were inde-

pendent of the trial of the causes. It further advised that the question of compliance with discovery was to be distinguished from the suppression or destruction of evidence, which latter matters were pertinent for the jury's consideration.

In this regard the court invited defense counsel to submit evidence of suppression, if any they had, and instructed the jury as follows: "If the People do not present evidence which is available to them which they would naturally be expected to bring before the court, and which is not available to the defendants, you may infer, if it seems reasonable to you to do so, that this evidence would have been unfavorable to the People.

"If you find that any investigating officers wilfully concealed or destroyed evidence in order to prevent its being brought before the court in this trial, you may presume that the evidence, if presented, would have been adverse to the People's case, and you may consider such conduct in determining the merits of their case.

"Note, I do not say that any investigating officers have wilfully concealed or destroyed evidence. This is a question which you must first determine before you may consider the presumption which I have referred to."

[15] The issue raised is a novel one, and we have concluded that the question of compliance with a discovery order is not a matter for the jury's consideration providing, of course, that the jury's right to determine matters bearing on the suppression of evidence is not restricted. [14b] As stated, the record presents no ground for a reasonable belief of misconduct on the part of the prosecution in the instant case. (See *People* v. *Kroeger*, 61 Cal.2d 236, 246-247 [37 Cal. Rptr. 593, 390 P.2d 369].)

The court did not give an instruction on second degree murder or manslaughter, and instructed that defendants were either not guilty of murder at all or were guilty of murder of the first degree. It must be presumed that defen-

dants, if guilty of murder of the first degree, were guilty under the felony murder doctrine, as no instructions on premeditation and deliberation were given. (Pen. Code, § 189.) Thus, the jury was instructed, in effect, that if it found defendants committed the unlawful killing then it must further find that the killing occurred in the perpetration of a robbery. That a robbery had been committed is uncontroverted and appears as a matter of law.

The defendant Teale's only defense was a denial of the commission of the homicide. (See *People* v. *Turville*, 51 Cal. 2d 620, 633 [335 P.2d 678]; *People* v. *Imbler*, 57 Cal.2d 711, 715 [21 Cal.Rptr. 568, 371 P.2d 304].) Mrs. Chapman, in addition to a denial, submitted evidence tending to show that she lacked mental capacity to form the requisite intent. However, such testimony was to the effect that she suffered from a "disassociative reaction"; that when she found herself in an uncontrollable situation she would " 'black out' by simply not knowing."

[16] Defendants, who did not request an instruction on second degree murder or manslaughter, now complain that the court should have given such instruction on its own motion, and that the same were required on the theory that the homicide occurred in the perpetration of a felony other than one of those mentioned in section 189 of the Penal Code, that is, simple kidnaping. Thus, it is claimed, that since the jury found a simple kidnaping as well as the robbery had occurred such additional criminal act made it incumbent upon the court to instruct on second degree murder.

The foregoing contention is obviously without merit. Where, as here, the evidence compels a conclusion that a murder, if committed at all, was committed in the perpetration of a robbery and for that reason is murder of the first degree, it does not follow that if it further appears that such murder was committed in the perpetration of robbery *and* simple kidnaping it now becomes murder of the second degree. The fact that a second, lesser homicide has *also* been

committed does not require instructions thereon where, conceding the homicide, the greater offense appears as a matter of law. The only real question before the jury was thus whether defendants were the perpetrators of the homicide.

[17] It is contended that, at least as to Mrs. Chapman, her crime might have been manslaughter because she could not have entertained the specific intent to murder, but might have entertained the lesser intents associated with involuntary manslaughter. (See *People* v. *Modesto,* 59 Cal.2d 722 [31 Cal.Rptr. 225, 382 P.2d 33].) But an objective evaluation of the defendant's evidence as to her mental capacity does not permit a reasonable conclusion that she could not have acted with "malice aforethought" (Pen. Code, § 187), and at the same time have entertained an intent to commit an "unlawful act, not amounting to a felony" or a lawful act "in an unlawful manner, or without due caution and circumspection." (Pen. Code, § 192.) According to her expert witness' testimony she did not have the mental capacity to commit any crime. Hence, the jury was properly instructed that defendants were guilty of murder of the first degree or were not guilty of the unlawful commission of any homicide.

[18] Error is claimed by Mrs. Chapman in instructions given on the effect which intoxication of an accused may bear on the question of specific intent where such intent is an element of the crime charged.[1] The challenged instructions are similar to those condemned in *People* v. *Spencer,* 60 Cal.

[1] The portion of the instructions objected to were as follows: "Our law provides that no act committed by persons while in a state of voluntary intoxication is less criminal by reason of his or her having been in such condition. This means that such a condition, if shown by the evidence to have existed in the defendants at the time when allegedly they committed the crimes charged, is not of itself a defense. It may throw light on the occurrence and aid you in determining what took place; but when a person in a state of intoxication, voluntarily produced in himself, commits a crime, the law does not permit him to use his own vice as a shelter against the normal, legal consequences of his conduct."

2d 64, 86-87 [31 Cal.Rptr. 782, 383 P.2d 134]. Although further instructions which immediately followed properly stated the law, and, as in *Spencer*, "it appears that upon rather elaborate analysis a correct understanding of the relevant law can be gleaned from the instructions construed as a whole," nevertheless it was error to burden the jury with the confusing and contradicting instructions in such circumstances. However, for the reasons which follow, the error was harmless.

As in *Spencer*, the evidence of the defendant's intoxication was minimal and for that reason the erroneous instruction must be deemed nonprejudicial. (*People* v. *Spencer*, *supra*, 60 Cal.2d 64, 87.) Moreover, the defendant did not rely on intoxication in the ordinary sense. Her defense was that due to her emotional instability, coupled with the presence of alcohol in her system, she "blacked out" and suffered a complete mental disassociation. This theory was fully exploited by the defendant and in such circumstances the instant error on the effect of intoxication on ability to form a specific intent was not prejudicial.

[19] Defendant Chapman next claims that an instruction relating to confessions and admissions was not applicable to her, as she personally had made no such statements, and that it was prejudicial error to not so instruct the jury. In *People* v. *Burns*, 114 Cal.App.2d 566 [250 P.2d 619], it was held to be reversible error as to a nonconfessing defendant to fail to limit an instruction on confessions to his confessing codefendant. (See also, *People* v. *Wade*, 185 Cal.App.2d 226 [8 Cal.Rptr. 197].)

While it is true that the instruction on confessions and admissions was couched in general terms and, standing alone, would reasonably be construed to apply to Mrs. Chapman as well as Mr. Teale, it further appears that other instructions negated the error, if any, in the circumstances here prevailing. Moreover there was evidence of statements made by Mrs. Chapman, probably not amounting to admissions, which were testified to during the trial. Mrs. Chapman also made several statements which constituted admis-

sions but which were not put into evidence. Nevertheless, constant references were made to such statements by the various psychiatrists who testified, and defense counsel argued vigorously for the admission of an exhibit consisting of an 84-page statement by Mrs. Chapman. In each instance where a statement by Mrs. Chapman was referred to by a psychiatrist witness, the jury was admonished that the statement was not to be received as proof of the matters asserted, but only as going to the basis upon which the doctor had formulated his opinions. In addition the court instructed the jury at the close of the trial as follows: "During the course of this trial, psychiatrists have testified concerning the mental and emotional condition of defendant Ruth Chapman. During their testimony they related certain statements made by Mrs. Chapman to them. These statements were not evidence of the facts related, but were admissible only as they explained or formed a basis for the expert opinion of the psychiatrists concerning the mental and emotional condition of defendant Ruth Chapman."

It must be deemed, in view of the foregoing, that the jury was not misled as to those statements of Mrs. Chapman not received in evidence. As to extrajudicial statements which were received in evidence, the court instructed as follows immediately preceding the general instructions on confessions and admissions: "Where evidence has been received against one of the defendants but is not received as against the other, the jury may consider such evidence only as against the defendant against whom it was permitted to be received. It may not be considered by the jury for any other purpose, or against the other defendant.

"In the trial of this case, there were instances when certain evidence was admitted as against one of the defendants, but denied admission as against the other.

"Your attention was called to these matters when the rulings were made. But I would urge you again to keep in mind the distinctions pointed out in such rulings, and their effect. It may be difficult for you, when considering the case for or

against any one defendant to completely disregard any evidence that you have heard or seen, but that is your plain duty with respect to evidence not admitted by the court as against that defendant, and you must try conscientiously to so treat such a situation.

"Where evidence has been received of a statement of a defendant after his or her arrest and in the absence of his codefendant, such statements can be considered only as evidence against the defendant who made such statement and cannot be considered for any purpose as evidence against the codefendant.

"If in this trial any evidence has been received of a statement or admission of Thomas Leroy Teale after his arrest and in the absence of his codefendant, such statement can be considered only as evidence against Mr. Teale and cannot be considered for any purpose as evidence against Ruth Elizabeth Chapman.

"Likewise any evidence of a statement or admission of Ruth Elizabeth Chapman after her arrest and in the absence of her codefendant can be considered only as evidence against Mrs. Chapman and cannot be considered for any purpose as evidence against Thomas Leroy Teale."

In view of the foregoing specific instructions immediately preceding the general instructions on admissions and confessions we are persuaded to the conclusion that the jury reasonably could not have applied either Mrs. Chapman's excluded extrajudicial statements or the admissions which the defendant Teale made to his fellow inmate in determining the individual guilt of Mrs. Chapman.

No contention is made that any of the extrajudicial statements were received in evidence in violation of defendants' right to counsel as enunciated in *Escobedo* v. *Illinois*, 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977], *Massiah* v. *United States*, 377 U.S. 201 [84 S.Ct. 1199, 12 L.Ed.2d 246], and *People* v. *Dorado*, 62 Cal.2d 338 [42 Cal.Rptr. 169, 398 P.2d 361], and it otherwise does not appear that defendants' rights in this regard have been infringed. In any event,

aside from Teale's statement to his fellow inmate, which clearly falls outside the proscription of *Escobedo, Massiah* and *Dorado,* the admission of other statements could not have resulted in a miscarriage of justice. (Cal. Const., art. VI, § 4½.)

[20] As stated, neither defendant testified in his or her own behalf in the exercise of their constitutional privilege. The prosecuting attorney, during his summation to the jury, commented on numerous occasions regarding the failure of either defendant to explain certain factual matters established by independent evidence. Such comments went to the motives for the procurement and handling of guns purchased by Mrs. Chapman, funds or the lack thereof in Mr. Teale's possession immediately prior to the killing, the amount of intoxicating liquors consumed by defendants at the Spot Club and other taverns, the circumstances of the shooting in the automobile and the removal of the victim's body therefrom, who fired the fatal shots, why defendants used a false registration at a motel shortly after the killing, the meaning of a letter written by Mrs. Chapman several days after the killing, why Teale had a loaded weapon in his possession when apprehended, the meaning of statements made by Teale after his apprehension, why certain clothing and articles of personal property were shipped by defendants to Missouri, what clothing Mrs. Chapman wore at the time of the killing, conflicting statements as to Mrs. Chapman's whereabouts immediately preceding the killing and, generally, the overall commission of the crime. In addition to the foregoing the court, in instructions to the jury and in accordance with the California Constitution provision (Cal. Const., art. I, § 13), stated, among other things, that the failure of defendants to testify from facts within their knowledge in explanation of incriminating evidence, may be deemed as tending to indicate the truth of such incriminating evidence and "that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."

The foregoing comments and instructions have been ruled in violation of the Fifth and Fourteenth Amendments (*Griffin* v. *California*, 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed. 2d 106], *Malloy* v. *Hogan*, 378 U.S. 1 [84 S.Ct. 1489, 12 L.Ed.2d 653]), but the question remains whether in any particular instance the error in allowing such comments and in giving such instruction has resulted in a miscarriage of justice requiring a reversal of the judgment of conviction. (*People* v. *Bostick*, 62 Cal.2d 820, 823-827 [44 Cal.Rptr. 649, 402 P.2d 529].)

It clearly appears that the error in allowing the comments and in giving the improper instruction could not have resulted in a miscarriage of justice as to the defendant Teale. While he may not have confessed to the crime, nevertheless the admissions which he made to his fellow inmate are so damaging that, when considered with the other substantial evidence, the proof of his guilt must be deemed overwhelming. His statements, of course, were not admissible against the defendant Chapman. Nevertheless the persuasive, circumstantial web of evidence which implicated her was not refuted, and the only real defense which she urged at the trial level was her claimed inability to form a criminal intent, which she sought to establish through expert witnesses. The comments and instruction on her failure to explain away the circumstantial web of evidence become of less significance in view of the defense's complete failure to refute such evidence by any means whatsoever. That evidence, in effect, stands unchallenged and the prosecutor's and court's remarks add little to its stature. Moreover, we are unable to discern what bearing, if any, the remarks would have on the defense of an inability to form the requisite intent, as interposed by Mrs. Chapman. This being a technical defense based upon expert opinion, comments on her failure to testify could not be material thereto. In view of the almost complete failure to submit *any* rebuttal, the comments and instruction added little which was not already apparent to the jurors, that is, the defendants

were not disposed to question the truth of the facts asserted by the prosecution's witnesses.

We are therefore of the opinion that in the absence of the erroneous comments and instructions a result more favorable to defendants was not reasonably probable in view of the entire record (*People* v. *Watson*, 46 Cal.2d 818, 836 [299 P.2d 243]), and that there has been no miscarriage of justice as to either Mrs. Chapman or Mr. Teale.

[21] Contention is also made by the defendant Teale that prejudicial error occurred in the penalty phase in the court's instructions, and the prosecutor's arguments going to the role played by the Adult Authority in fixing parole for those convicts sentenced to life terms. (*People* v. *Morse*, 60 Cal.2d 631 [36 Cal.Rptr. 201, 388 P.2d 33].) However, the instructions and arguments fall far short of those condemned in *Morse*.

The instruction to which exception is taken is as follows: "Further the law of this state provides that every person guilty of murder of the first degree shall suffer death or confinement in the state prison for life with the possibility of parole." And the language of the prosecutor to which particular objection is taken is as follows: "For example, if you feel that a term in prison, for example —, with all of the facilities for rehabilitation and so forth, would insure, insofar as human reason can infer, that these defendants, even if they are ultimately and they will be one day perhaps—there is a possibility if they are—the death penalty is not invoked, possibly they may be paroled.—They may not be, but again they may be. It is the law."

The jury was not advised of the role which the Adult Authority plays, the conditions under which parole is granted, statistical information relative to past and current practices in granting parole, or any of the other matters condemned in *Morse* as improper for the jury to consider. Insofar as appears the jury was advised only that a convict undergoing a life sentence might someday be paroled and the further obvious inference might be drawn from the

prosecutor's remarks that if the death penalty is invoked there is no possibility of parole. Manifestly, the invitation to the jury to speculate and surmise as to the improper release of a defendant to society in the future if a life instead of a death sentence is imposed, upon which *Morse* turned, is completely lacking in the instant case.

[22] As the evidence clearly indicates that all of the crimes charged and of which Mrs. Chapman stands convicted are inseparable, she was improperly sentenced for all three counts. (*People* v. *McFarland*, 58 Cal.2d 748 [26 Cal.Rptr. 473, 376 P.2d 449]; *People* v. *Houston*, 219 Cal.App.2d 187 [33 Cal.Rptr. 26].) Thus the judgment, insofar as it imposes punishment for robbery and kidnaping, the lesser crimes, must be reversed as to Mrs. Chapman. As the death penalty was imposed on the defendant Teale he is not affected by the multiple sentencing. (*People* v. *Seiterle*, 59 Cal.2d 703, 712 [31 Cal.Rptr. 67, 381 P.2d 947].)

The judgment is reversed insofar as it imposes sentences for robbery and kidnaping on Mrs. Chapman, and in all other respects is affirmed. The judgment as to the defendant Teale is affirmed in all respects.

Traynor, C. J., McComb, J., Peters, J., Tobriner, J., Schauer, J.,* and Dooling, J.,* concurred.

Appellants' petition for a rehearing was denied August 27, 1965, and the opinion was modified to read as printed above. Schauer, J.,* sat in place of Mosk, J., who deemed himself disqualified.

APPENDIX D

Constitutional Provisions and Statutes Involved

Fifth Amendment, United States Constitution:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 13, California Constitution:

"In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; not be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. . . ."

Article 6, Section 4½, California Constitution:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Section 187, Penal Code of California:

"*Murder.* Murder is the unlawful killing of a human being, with malice aforethought."

Section 207, Penal Code of California:

"Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or into another part of the same county, or who forcibly takes or arrests any person, with a design to take him out of this state, without having established a claim, according to the laws of the United States, or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free will and consent of such persuaded person; and every person who, being out of this state, abducts or takes by force or fraud any person contrary to the law of the place where such act was committed, and brings, sends, or conveys such person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnaping."

Section 209, Penal Code of California:

"*Kidnaping for Blackmail or Robbery—Punishment.* Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison, for life with possibility of parole in cases where such person or persons do not suffer bodily harm.

"Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole."

Section 211, Penal Code of California:

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

Section 825, Penal Code of California:

"*Accused Under Arrest to Be Allowed Counsel and to Be Brought Before Magistrate—Penalty for Denial.* The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when the court in which the magistrate is sitting is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following.

"After such arrest, any attorney at law entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who wilfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor, shall forfeit and pay to the party aggrieved the sum of five hundred dollars ($500), to be recovered by action in any court of competent jurisdiction."

APPENDIX E

Argument and Comments by the Prosecutor on the Failure of the Defendants to Take the Witness Stand

"Mr. Ferguson: Now, ladies and gentlemen, I don't know which one of these weapons was purchased first, I don't know that it particularly makes any difference, but as you know, we have had no testimony at all in that regard, in fact, I might add that the only person or persons that could give testimony in that regard would be, of course, the defendants themselves . . ." (RT 1808:21-26.)

"Now, this, there's no question about what this represents, or for the record here, no question in your minds, this is not the weapon that Ruth Elizabeth Chapman purchased in Reno, Nevada, on October the 12th, 1962. I don't know where that weapon is, ladies and gentlemen, and you don't know where it is, you've heard no testimony from the stand at all, and once again, the only person or persons that could tell us about where the original .22 caliber Vestpocket is today would be one or the other of the defendants or both." (RT 1809:5-13.)

"This would indicate that there was no small struggle—it would indicate that the body, almost lifeless, was dragged or left in some fashion which would cause a shirt or an article of clothing to tear, one or the other. Once again, ladies and gentlemen, I don't know. I wasn't out there, you were not out there. You heard no testimony on the stand. The only individuals that could give you that information would be the defendants, either one or both of them, Thomas Leroy Teale and Ruth Elizabeth Chapman. And of course you know that you have not heard from them.

"Now, I will comment throughout my entire opening argument to you in reference to the fact that neither one of these defendants has seen fit to go up, raise their right hand, take that witness stand, tell you ladies and gentlemen of the jury exactly what did occur, explain to you any facts or details within their knowledge so that you would know. You would not have to—by His Honor's instructions you can draw an

adverse inference to any fact within their knowledge that they could testify to, and they have not subjected themselves, either one or both, to cross-examination. Now, that is—so there is no question in your mind, once again with reference to a defendant taking the stand, none—you are —you or I or anyone else is not required under our legal system in these United States and under the Constitution, you can not be made to testify against yourself or for yourself, as far as that goes.

"So, it is a Constitutional right, and both of these defendants have seen fit to avail themselves of that Constitutional right, but I say to you ladies and gentlemen, there are many things in this case, and I will try to point them out to you, at least some, probably not all, that these defendants are in a position to take that stand and to testify under oath and give you facts concerning. They have not seen fit to avail themselves of that opportunity." (RT 1822: 15 to 1823:22.)

"Now whether or not Mr. Teale had any other money at the time or was in the habit of concealing his money in different departments, I don't know, and ladies and gentlemen, you don't know, because you have not had any testimony from that witness stand, and the only person that could clear this up for us ladies and gentlemen is the defendant Thomas Leroy Teale. Ladies and gentlemen, he has not seen fit to tell you about that. But certainly we know that bogus checks are being written, and as I recall we know that—I don't—we may infer, if you wish to believe there is an inference which Mr. Teale could have cleared up, that that was all the money that he had, and he didn't clear it up, so you may draw an adverse inference from that, that that was all the money he had, or in fact that he—at that time he was in desperate need of funds, and you know that through some kind of a discussion between these two defendants in regard to Mr. Teale shooting dice, that this was all he had." (RT 1824:8-24.)

"Now, ladies and gentlemen, in reference to the weapons being purchased in Reno, Nevada on October 12th, you

have heard, ladies and gentlemen, no testimony, and you will recall clearly, you are going to have some difficulty, you really are in reference to what is and what isn't evidence in this case, and believe me I have a few comments to say on that a little later on, but if you will recall as far as evidence is concerned of the truth of anything at all, you don't have any evidence on these—why these pistols were purchased. Why did Ruth Elizabeth Chapman buy two weapons? Well, you do recall that she told on one occasion that she had had a pistol stolen from her vehicle, her automobile, when she was taking a little trip across country, you remember that testimony, and you can rely on the testimony that you actually hear, ladies and gentlemen, from the stand. She told that, and of course you can only rely that she told the gentlemen that, that she had had another one stolen, and so that she needed one to replace it. But why two, ladies and gentlemen? You don't need two. If she is going to be attacked she wasn't going to use one in each hand I assume to defend herself, and there is another area, ladies and gentlemen besides this that I mentioned to you before, that since you have no testimony from the stand, you must surmise from all facts and circumstances as to the exact reason why they were purchased, because the only one in this room that could tell you why these guns were purchased is either one or both of the defendants. Certainly the defendant Ruth Elizabeth Chapman could tell you, she could tell you under oath, she could subject herself to cross-examination, and she could tell you then and it would be evidence before you. Once again she has not chosen to do this. So any inference you may draw therefrom will be an adverse inference under the circumstances, and under the instructions of the Court." (RT 1826:16 to 1827:22.)

"So, we know, ladies and gentlemen, that they had the motive, we know that they had the means, we know that they had the opportunity. We also know that they were at that scene, ladies and gentlemen, they were with that man

just a matter of minutes before he was shot in the head three times with a gun similar to People's Exhibit No. 12. Now, if they weren't there, and I think the evidence clearly shows they were, scientific evidence, that we'll talk about a little later. Once again, why don't they come up and raise their right hand and tell you about it?

"Mr. Ferguson: To me they are charged with serious crimes, ladies and gentlemen. They can come up and testify and then it will be evidence for you to consider in this case. If they had just come up and told you about this, because they were there. If they left the Spot Club and just went on their way, well, of course they didn't, the evidence clearly shows they didn't, but you may draw the adverse inference from their refusal to come before you and raise that right hand and incidentally, of course, subject themselves to cross-examination." (RT 1827:24 to 1829:10.)

"I think it is not an unreasonable inference to infer at this time if the defendants were drinking beer earlier in the evening in Croce's, it's not unreasonable to infer they continued drinking the same thing, therefore the two glasses remaining that had been washed, but not put up were the defendants'. I don't know, it is an inference, I wasn't there, we have had no testimony whatsoever as to what they were drinking at the Spot Club, once again, neither one of the defendants have seen their way clear to come up and tell you what they were drinking if it was beer." (RT 1838:9-18.)

"So you can see that whichever one of these defendants shot him, because we have had no testimony from that witness stand to tell you who shot him, and the only two persons in this courtroom that could tell you which one of them it was that shot him are the two defendants; but once again, they have both decided that they will not get up and raise their right hand and testify in this regard and subject themselves to cross-examination, so all we know is that one of them shot him." (RT 1840:22 to 1841:6.)

"We don't know the time here, it doesn't say. We don't have any testimony, ladies and gentlemen, in this regard,

and I might say once again in reference to this last, the use of the name, T. L. Rosenthal, Mr. and Mrs., we don't know why, ladies and gentlemen, that name was used. We don't know why, ladies and gentlemen, that UZV 155—was 156 originally on here. You don't know that, and I don't, because we haven't had the testimony from the witness stand on it. Now we know it is in the handwriting of Ruth Elizabeth Chapman, and there is no question about that. She wrote it. It could be evidence, ladies and gentlemen, for you. It could be evidence as to why she wrote the name, and why that five was changed to a six. We could have it. But we don't, because either one or both of the defendants, neither one, have seen fit to take the stand and to testify in that regard. Then this would be evidence that you can consider. But also ladies and gentlemen, subject to taking the oath and subject to cross-examination." (RT 1844:19 to 1845:9.)

"We see it here in Mountain View, the Mountain View Motel, the name of Teale, but we don't have the testimony of the defendants and ladies and gentlemen they are the only ones here in this case that could get up there and tell you why they used a phony name two hours after the crime and why they didn't put the correct license down and whatever inference you draw you are permitted to draw since they do not choose to tell you an adverse interest, and I would say, ladies and gentlemen, that it is an adverse interest to the defendants. It shows guilt." (RT 1845:5-14.)

"Now, ladies and gentlemen, what is this—first of all, 'I thought I'd better let you know that Tom arrived here today and we're going south tomorrow'? Now, what does that mean? Well, I think without saying a great deal more about it that each one of you can certainly infer as to what it very readily could mean, especially if one had in fact committed a robbery and kidnapped someone from the premises and that individual has ended up dead, shot three times in the head. And further, ladies and gentlemen, the only other thing I can say about it is this, who can really tell

you and who could have told you from evidence, from the witness stand, what that letter meant? Well, the only one is Ruth Elizabeth Chapman, ladies and gentlemen. If it didn't mean what you can reasonably infer that it means, then I say, ladies and gentlemen, she could have come up here and testified, gotten on the witness chair. We have had many witnesses in this case, no one I would assume more interested than Ruth Elizabeth Chapman, or the co-defendant, neither one took the stand. She in no way, nor has there been any way, ladies and gentlemen, any kind of evidence that has actually been admitted for the truth of the evidence, in no way is there any evidence as to why she wrote that letter, and what she meant by 'Tom is arriving today and we're going south.' Once again, she did not choose to tell you. So, we may only infer, and this will be, of course, you will have to in your final analysis draw any inferences from that that you feel are appropriate and are proper—" (RT 1848:12 to 1849:11.)

"Mr. Ferguson: He was a fugitive from justice, and he knew he was a fugitive from justice, and he never—let's face it, there were four F.B.I. agents and these fellows are professional and they know what they are doing and one of them had a gun out and he never had an opportunity to use it, and none of us here will ever know from all the testimony, from the actual testimony on the stand why he had the weapon with him fully loaded, because Mr. Teale has never taken the stand in this case and testified for you. These things are things only within his knowledge, ladies and gentlemen. If there is any fact in this case of any relevancy of any importance it is within the knowledge of a defendant, and they chose not to take the stand and tell you about it, where incidentally they were under oath and can be cross-examined. You may draw an adverse inference from the fact that they do not take it. I think the inference is very clear, too, why they had this weapon here and why he never—why it was fully loaded. Remember there was never an opportunity to use it. The weapon

was purchased by Ruth Elizabeth Chapman. Now when he is apprehended and fleeing from the State he had it with him it was fully loaded. Once again, I don't know where the original is here, and you know the only two that can tell us where that is." (RT 1854:1-24.)

"Now, you recall also that when Mr. Basham took him back in, was fingerprinting him, etc., he told him he was wanted in California and no one mentioned anything about Lodi, and he said that he would waive extradition, and he also did say he said, 'They will have a hard time proving I was there.' And Teale himself did mention Lodi. Well, I don't know what he meant by that statement. I certainly can draw my own conclusion, and you sure will draw yours as the triers of the facts and the judges of the facts, ladies and gentlemen, but once again Mr. Teale did not take the stand and testify under oath in this case, and Mr. Teale has not desired to take the stand and explain what he meant by it. He didn't have to, of course, but once again you can draw whatever inferences you may feel, and the law is clear that you may draw an adverse—where a defendant does not explain and he does not choose to take the stand and explain it to you, you can draw an adverse inference." (RT 1854:24 to 1855:14.)

"Mr. Ferguson: Photographs. You've seen them, ladies and gentlemen, but as you recall the doctor now is pointing, and this is the picture of the deceased, the back of his head, as to where he was shot in the back of the head, you recall the other one as to where he was shot in the side of the head, right here on the left in the general area of where the glasses would be, I think it's a most reasonable inference, ladies and gentlemen. Now, once again we have had no testimony except what would seem clearly logical from the experts, the way the body was found, where he'd been shot, what he'd been shot with, and the position of the glasses in relation to the body at the death scene, we had no other testimony. Certainly none from the defendants in this case." (RT 1860:18 to 1861:4.)

"Agent Gilmore has drawn and made some notations in reference to where that blood was located, blood found on these shoes. Now, all we know, ladies and gentlemen, as far as evidence in this case is concerned, is that these shoes belonged to Ruth Elizabeth Chapman and they were in her possession when she was apprehended in St. Joseph, Missouri, and why do I say that's all you know? That's all you may take into consideration, ladies and gentlemen, because we have no other testimony on this witness stand in relation to any of these articles of clothing that are actually admitted into evidence." (RT 1861:22 to 1862:6.)

"You have two box lids, two of them, and you've heard the questions concerning them, they would indicate that they were sent to a Mrs. Howard Smith at 2206 Castle Avenue, St. Joseph, Missouri, and I believe it was on the 11th of October, says from Thomas Teale, 1105 Del Norte, Eureka, California, they both say essentially the same thing, 10-11, there's no year, but I think we can surely infer it was in 1962, and apparently from Reno.

"Now, ladies and gentlemen, there's been a lot of talk, suggestion, and whatever you want to call it, I'll call it a smoke screen, in reference to these two lids that came off, and we'll assume there was a box underneath them, I don't think there's any question about that. Where have you ever heard from that witness stand, ladies and gentlemen, what was ever in those boxes? Now, you've heard some self-serving declarations that are not admitted into evidence because they come through someone else who in some fashion gets testimony before you, but no cross-examination of the original party who is giving that kind of testimony, and you can't consider it." (RT 1861:22 to 1862:6.)

"Mr. Ferguson: Thank you, Your Honor. Counsel has interjected himself into this, and he'll have every opportunity to make his own comments, and I'm sure he'll most adequately express himself when the time comes. I'm telling you, ladies and gentlemen, that the only evidence that you have is that you have two box tops. Now, he's just sug-

gested to you, so I'll answer this ahead of time, but the evidence is clear that Mr. Sperling packed these boxes, but you will recall Mr. Sperling was not at the original scene when they were taken. Maybe it isn't unusual to infer there may have been clothes, but what I'm getting at is this is what clothing? You don't even know there was clothing in them when they were shipped. It could have been other household articles. And even if we assume it was clothing, and that's not unreasonable because basically these are the items we found and brought back with us to Lodi, we don't know which clothing she shipped at this time. Couldn't this be cleared up for us, though? It could be cleared up so easily. Ruth Elizabeth Chapman is sitting right over here, she is one of the defendants in this case and she is the one certainly if anyone, if anyone in this room, or in this state knows what was in those boxes she is the one, but once again she did not take the stand, raise her right hand, and tell you about that. She didn't take the stand at all, ladies and gentlemen, she could have come up and told us exactly what articles were sent, so you may draw any inferences from that that you wish to, as long as they are reasonable." (RT 1863:17 to 1864:17.)

"Now, anything that—is clearly, and I'm sure you know by now and I don't have to repeat it too often, anything in this case that Mr. Teale could get up here now, he don't have to get up here, but all of the things that have been said in this trial and all of the physical evidence and the testimony, he's right here in Court and could he not get up and if there is anything to be said he has the opportunity to say it. Otherwise, you may draw the adverse inference from the fact that he doesn't get up there and tell you about it, and that, ladies and gentlemen, is his defense. Mr. Fransen said in the beginning that what happened in this case is not as the prosecution described it. That the facts will show an entirely different version. Well, I haven't heard any facts, ladies and gentlemen, that show an entirely different version." (RT 1881:3-16.)

"I would say that there wasn't very much of anything that he said that he did prove.

"Once again, Mrs. Chapman did not take the stand and explain these things and tell us about them as she could have." (RT 1882:3-7.)

"We went through a business with a—dress. We held it up, and then we pointed out the one that she's wearing now, and frankly, ladies and gentlemen, the only one in the Court room that can tell you whether or not it is the same dress is Ruth Elizabeth Chapman, because you know from the evidence no one has ever had an opportunity to examine that dress to see whether it has been dry cleaned, whether or not it was purchased—when it was purchased or the labels on it or anything else. All that has been done in this thing is to wear a blue knit dress, ladies and gentlemen, which is similar to the one that—she in fact apparently wore on that night.

"So, I suppose that just through the wearing of it, having it in Court, it is hoped that you will draw something from it, which I have heard no testimony on the stand, except that it looks like or is similar to it." (RT 1882:13 to 1883:2.)

"But what she told that doctor is not evidence in this case, and yet you know that repeatedly and over and over and over again Mr. Johnson in every way that he could, he would get the story again before you. Now, why? You know why. He did it because he hopes that you wouldn't forget it, although he could put it and make it evidence in this case, which it is not, and if you put Ruth Elizabeth Chapman upon that stand to testify, so it is one way of doing, ladies and gentlemen, if you are going to be taken in by it, indirectly what you can't do directly, because there is no other way that he can get that thing before you without putting her up on that stand." (RT 1883:15-26.)

"I say, ladies and gentlemen, to make that evidence in this case would be so simple just to come up here and

sit on that witness stand and that would make it evidence in this case, but not when you get in indirectly what you can't do directly, and the only way they can do it directly is by putting that defendant on the stand." (RT 1886:3-8.)

"But she gave a story on the night of the 17th and early hours of the 18th. She was in San Francisco. Now, why pick on that date so specifically if you are not—if not to beware of that date, that you want to beware. Well, he says, 'You have given two different stories. Do you have problems with blackouts or excessive drinking', and she says 'No.' And I tell you, ladies and gentlemen, that anybody, and there is no evidence to the contrary in this case, if you don't honestly remember what occurred and you know, you are in a situation where there is a fugitive warrant and you have just been arrested and you in all honesty don't remember where you were, that is the first thing that you are going to say. You're not going to sit up and trump up excuses and make out a story which you know to be a lie about specific dates and times. And, ladies and gentlemen, there is no legal evidence before you that it is anything to the contrary, because the only one now that can come up and tell you has not seen fit to do so." (RT 1889:5-21.)

". . . Mr. Johnson would have you believe that everything she said was the truth. I think there are some instances that indicate already—I have indicated some, the purpose of the guns, two different ideas there as to why they were purchased, but that is the only legal purpose for that. So, it's not evidence, although Mr. Johnson again I say argued and referred to it as though it was. We have no evidence from the lips of Mrs. Chapman. Now, as Mr. Ferguson told you, it is their constitutional right, and I won't go into that again, because I think he handled it very clearly as well as the others, but that is within her right to do as she sees fit. But, you can consider it for the purposes and under the circumstances that Mr. Ferguson indicated a number of times." (RT 2106:4-16.)

"Originally when Dr. Winkler examined her on the 31st, I believe it was, of October, 1962, she told him that she had forgotten after the first shot was fired, after the first shot was fired. Since that time what has happened? The amnesia, or disassociative state, or disassociative reaction, whichever way you want to look at it, psychiatrically or otherwise, seems to have backed up from Dillard Road back up to the Spot Club, back up down Highway 99 south to just outside of Croce's, and by the time we get through cross-examining Dr. Sheuerman it even backed in to Croce's. A vague area. Very interesting. We could have put it on, put the statement in. It's evidence? It's not. Again, the sanctity and worthiness of evidence would have to come from her lips, hers on the stand here. Why? Here again, because witnesses would be under oath again, and I repeat, and I repeat for emphasis, they would have to be under oath subject to cross-examination before your very eyes so that you could evaluate it. Oh yes. She said this and she said that. Why said it? Who said it? Ruth Elizabeth Chapman on the stand? No. Dr. Sheuerman said that she said it. Dr. Winkler said that she said. Mr. Johnson said that she said. Well, it's an interesting thing that the only witnesses who weren't here, or weren't on the stand to be cross-examined, the only witnesses who are alive today to the perpetration of these offenses, are these two defendants. That's all. They don't have to take the stand. That's been gone over many times, but you know it would be a fine thing, very fine deed if persons who perpetrated offenses gave a story, put a story on by somebody else, have somebody else speak for you—wouldn't it? It would be a very interesting thing. You would never have the benefit of evaluating their credibility. This is what Mr. Johnson would have you believe that we should have done. Monday morning quarterbacking. And I submit to you—you know, you—you have heard much about lawyers being referred to as 'mouthpieces'. It's actually a very rare thing, really, that that type of appellation is applicable to lawyers really.

But, I think you have seen a demonstration here, and I'm not saying it in rancor, not anything of it at all, because this is a demonstration where actually Ruth Elizabeth Chapman is speaking through Mr. Johnson. 'A 'mouthpiece'." (RT 2108:17 to 2109:20.)

"Maybe there is another reasonable one, other than the fact that it was Adcock's blood, because all three who were in the car had type A. Maybe there is, but you haven't heard it. You haven't heard any reasonable explanation of that. So, you can draw an adverse inference that it was Billy Dean Adcock's blood." (RT 2114:7-12.)

"Mr. Johnson said these several things which I will go over again. The evidence showed here that she bought two guns for Teale. What evidence? No witness on the stand got up there and said specifically under oath, and the only one that could do it would be Elizabeth Chapman herself. This is hearsay, what she told somebody else for the sole purpose of determining what her state of mind was at the time. It's not evidence. There's some evidence from her own lips through Dennis Mack as to the reason she bought the gun, which is different than what she said otherwise. Mr. Johnson said the evidence shows there was an argument in Fresno. Here again I would say, 'What evidence?' The next one—there are only two people there to that argument, and the only way it would be evidence, or testimony in this case, would be if either one or both of them got up there and said there was an argument. They chose not to do it. You can draw an adverse inference that that being within their knowledge, that they could explain, whether it was or not. You can draw an inference that it wasn't the type of argument that Mr. Johnson claims the evidence shows, because the evidence doesn't show that at all." (RT 2115:9 to 2116:2.)

"So far as the motive is concerned for the murder in a perpetration of a robbery, the motive was set, to gain for their own desires and lusts and so forth, to gain from it. It was a crime of gain, and perhaps another thing too, in

deciding—we don't know who pulled the trigger—we may never know. The defendants haven't indicated it, except through Teale in one—Mr. Vowell's testimony, as to what Mr. Teale said, but that is not admissible against, and you shouldn't consider it against, Ruth Elizabeth Chapman, but maybe the circumstances of who pulled the trigger might have been a factor that might have been important to you. Only two people know. They didn't tell you. That is the way they want to proceed. But nonetheless, you can consider that too." (RT 2256:14-26.)

"So, in considering what happened here as to why this person was killed, you see you can weigh these things and decide what the motive was. You might have had some help in deciding this very difficult task from the very only two people remaining who were at the scene, but in their best judgment they didn't choose to get up and tell you about it, which you certainly can consider that fact that they did not in the light of using your reason as I have indicated here too." (RT 2257:12-19.)

"You know that somebody shot Billy Dean Adcock, and you know that it was either—it was one or even both of these defendants, in view of your verdict, but which one you don't know. Now, this is something that perhaps might have been of help to you in deciding what punishment to mete out, whether both should be punished equally in this case, or whether there should be some distinction between the two. It might have been helpful to know who pulled that trigger, for if it was Ruth Elizabeth Chapman you could well deduce that it was either her intoxication or emotional stress or a jealousy of Teale, or anger, and a lot of things other than the motive to destroy a witness; whereas, with respect to Mr. Teale it would seem to be a logical thing to conclude that he wanted to get rid of the only eyewitness. Differences there, you see. But you don't know. You don't know whether they did it in consort. You don't know that as far as pulling the trigger. But this is a factor which has not been brought to light, and you can consider that

factor which has not been, from the standpoint there have been two people that might have explained that." (RT 2258:10 to 2259:3.)

"I have gone into the statement here and why it hasn't been presented. If you are going to decide things such as character and sympathy, the law says you may take into consideration, how can you do it by a statement? Now, we are talking about this phase of the case. This now. You like to know that persons get—if there is something about their background that they can tell you, or something about their background that they can tell you, you like to hear it from them, because you have a very serious and difficult task, and the fact that they chose to rest upon whatever evidence there is here in the case in chief is something that you can consider in deciding whether or not they have been fair with you.

"This is the chance that they take by not having taken the stand." (RT 2288:8-21.)